(23)

No. 05-1342

Title: Linda A. Watters, Commissioner, Michigan Office of Insurance and Financial Services, Petitioner

v.

Wachovia Bank, N.A., et al.

Docketed: April 21, 2006

Lower Ct: United States Court of Appeals for the Sixth Circuit

Case Nos.: (04-2257)

Decision Date: December 19, 2005

Rehearing Denied: January 18, 2006

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Apr 18 2006	Petition for a writ of certiorari filed. (Response due May 22, 2006)
May 19 2006	Brief of respondents Wachovia Bank, N.A., et al. in opposition filed.
May 22 2006	Brief amici curiae of Iowa, et al. filed.
May 30 2006	DISTRIBUTED for Conference of June 15, 2006.
Jun 12 2006	DISTRIBUTED for Conference of June 15, 2006.
Jun 19 2006	Petition GRANTED. Justice Thomas took no part in the consideration or decision of this petition.
Jun 27 2006	Consent to the filing of amicus briefs in support of either party received from counsel for petitioner.
Jul 12 2006	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including September 1, 2006.
Sep 1 2006	Brief amicus curiae of National Association of Realtors filed.
Sep 1 2006	Joint appendix filed.
Sep 1 2006	Brief of petitioner Linda A. Watters filed.
Sep 1 2006	Brief amici curiae of Charles W. Turnbaugh, et al. filed.
Sep 1 2006	Brief amici curiae of New York, et al. filed.
Sep 1 2006	Brief amici curiae of AARP, et al. filed.
Sep 1 2006	Brief amici curiae of National Conference of State Legislatures, et al. filed.
Sep 1 2006	Brief amicus curiae of Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. filed.
Sep 15 2006	Extension of time within which to file respondents' brief on the merits to and including November 3, 2006.
Sep 29 2006	SET FOR ARGUMENT ON Wednesday, November 29, 2006.
Oct 4 2006	CIRCULATED.
Oct 12 2006	Record received from U.S.C.A. for 6th Circuit. (1 binder)
Oct 23 2006	Record received from U.S.D.C. Western Dist. of Michigan, Grand Rapids.

(1 envelope)

Nov 3 2006	Brief amicus curiae of United States filed. (Distributed)
Nov 3 2006	Brief amicus curiae of Clearing House Association LLC filed. (Distributed)
Nov 3 2006	Brief amicus curiae of Chamber of Commerce of the United States of America filed. (Distributed)
Nov 3 2006	Brief amici curiae of Administrative Law Professors filed. (Distributed)
Nov 3 2006	Brief amicus curiae of National City Bank filed. (Distributed)
Nov 3 2006	Brief of respondents Wachovia Bank, N.A., et al. filed. (Distributed)
Nov 3 2006	Brief amicus curiae of Economists and Scholars filed. (Distributed)
Nov 3 2006	Brief amici curiae of America Bankers Association, et al. filed. (Distributed)
Nov 3 2006	Brief amicus curiae of New England Legal Foundation filed. (Distributed)
Nov 6 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 13 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Thomas took no part in the consideration or decision of this motion.
Nov 22 2006	Reply of petitioner Linda A. Watters filed. (Distributed)
Nov 29 2006	Argued. For petitioner: E. John Blanchard, Assistant Attorney General, Lansing, Mich. For respondents: Robert A. Long, Jr., Washington, D.C.; and Sri Srinivasan, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Supreme Court, U.S.
FILED

(1)

No. 05-1342 APR 18 2006

OFFICE OF THE CLERK

In the Supreme Court of the United States

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Insurance and Financial Services,

Petitioner,

v.

WACHOVIA BANK, N.A. and WACHOVIA MORTGAGE CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. 12 USC § 484(a) of the National Bank Act limits visitorial powers over "national banks" except as authorized by federal law. National banks are defined and created under the National Bank Act. State-chartered nonbank operating subsidiaries of national banks are created under State corporate law. The Comptroller of the Currency, by Rule 12 CFR 7.4006, made 12 USC § 484(a) equally applicable to State-chartered nonbank "operating subsidiaries" of national banks. Is the interpretation of the Comptroller of the Currency that 12 CFR 7.4006 preempts Michigan's laws regulating mortgage lending as applied to State chartered nonbank operating subsidiaries, entitled to judicial deference under *Chevron USA, Inc v Natural Resources Defense Council*?[1]

2. A national bank has been declared to be a national corporation in *Guthrie v Harkness*.[2] 12 CFR 7.4006 treats a State-chartered nonbank operating subsidiary of a national bank as equivalent to a national bank and, thus, as a national corporation. The Tenth Amendment to the United States Constitution is violated to the extent a statute permits the conversion of State corporations into federal ones in contravention of the laws of the place of their creation. *Hopkins v Federal Savings & Loan Ass'n v Cleary*.[3] Does 12 CFR 7.4006, by equating a State-chartered nonbank operating subsidiary with a national bank for purposes of federal preemption of State regulation, violate the Tenth Amendment to the United States Constitution?

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[1] *Chevron USA, Inc v Natural Resources Defense Council*, 467 US 837 (1984).

[2] *Guthrie v Harkness*, 199 US 148, 159 (1905).

[3] *Hopkins v Federal Savings & Loan Ass'n v Cleary*, 296 US 315, 335 (1935).

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A. The OCC's preemptive interpretation of the National Bank Act as expressed in 12 CFR 7.4006 does not qualify for *Chevron* deference because 12 USC § 484(a) is clear and unambiguous, and the OCC's regulation therefore violates the unambiguously expressed intent of Congress. 8

B. The OCC's preemptive interpretation of the National Bank Act is not based on a permissible construction of 12 USC § 484(a). .. 17

C. The Court of Appeals decision is in conflict with the Tenth Circuit in *Colorado Public Utilities Commission v Harmon*, fails to consider this Court's decision in *Smiley v Citibank* and the District of Columbia Circuit decision of *American Bar Association v Federal Trade Commission*, and is not consistent with this Court's recent decision in *Gonzales v Oregon*. .....

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OPINIONS BELOW

The December 19, 2005, opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Wachovia Bank N.A. v Watters*,[4] and is reprinted in the Appendix hereto at 1a-12a. The Court of Appeals denied rehearing in an unpublished order dated January 18, 2006, and is reprinted in the Appendix at p. 28a.

The opinion of the United States District Court, Western District of Michigan, Southern Division is reported at *Wachovia Bank v Watters*,[5] and is reprinted in the Appendix at 14a-25a.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 19, 2005. An order denying petition for rehearing was entered January 18, 2006. This Court has jurisdiction over this petition pursuant to 28 USC § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Const, Art VI, § 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

US Const, Amend X:

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[4] *Wachovia Bank N.A. v Watters*, 431 F3d 556 (6th Cir 2005).

[5] *Wachovia Bank v Watters*, 334 F Supp 2d 957 (WD Mich 2004).

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

12 USC § 484(a)(National Bank Act) provides:

No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

12 USC § 24 (Seventh) (in pertinent part):

Upon duly making and filing articles of association and an organization certificate the [a national banking] association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking.

12 CFR 7.4006 provides:

Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.

STATEMENT OF THE CASE

The Court of Appeals decision divests and preempts Michigan's historic and traditional right to exercise its police powers over State-chartered corporations through State legislation intended to protect the public from abusive and predatory mortgage lending practices. The result is not supported by any clear intent of Congress.

Plaintiffs Wachovia Bank, N.A. (Wachovia Bank) and its State-chartered operating subsidiary, Wachovia Mortgage Corporation (Wachovia Mortgage) filed a Complaint in the United States District Court, Western District of Michigan, Southern Division. Plaintiffs' Complaint sought declaratory and injunctive relief prohibiting the Commissioner of the Michigan Office of Financial and Insurance Services (OFIS) from enforcing Michigan's mortgage laws against Wachovia Mortgage. Plaintiffs contended that Michigan's mortgage laws as applied to Wachovia Mortgage were preempted by the National Bank Act and regulations promulgated by the Office of the Comptroller of the Currency (OCC) when Wachovia Mortgage became an operating subsidiary of Wachovia Bank, a national bank. Plaintiffs also alleged that Michigan regulatory attempts violated 42 USC § 1983.

The District Court had jurisdiction over this action pursuant to 28 USC § 1331 inasmuch as plaintiffs alleged claims arose under the United States Constitution and federal law.

Commissioner Linda A. Watters

Linda A. Watters is the duly appointed Commissioner of OFIS. In that capacity, Commissioner Watters administers and enforces Michigan's Mortgage Brokers, Lenders, and Servicers Licensing Act (MBLSLA)[6] and the Secondary Mortgage Act

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[6] Michigan Compiled Laws (MCL) 445.1651 *et seq.*

(SMA)[7]. Commissioner Watters exercises general supervisi and control over mortgage brokers, mortgage lenders, a mortgage servicers doing business in Michigan.[8] The MBLSl and the SMA exempt depository financial institutions fr regulation.[9] However, State chartered, non-bank operati subsidiaries of depository financial institutions are required register with OFIS if the bank does not maintain a main office a branch office in Michigan.

The MBLSLA gives authority to the Commissioner of OI to protect consumers from unfair, unsound, and abusive lendi practices. It was passed in 1987 to address unscrupulc predatory lending abuses that came to light in a scandal involv the AJ Obie-Diamond Mortgage Company, in which Michig borrowers were charged exorbitant fees and title to their prope was often clouded. Losses to over 1600 investors tota approximately $50 million dollars. In a subsequent crimi prosecution stemming from this scandal, the Michigan Court Appeals called it "the largest reported ponzi scheme in the hist of the State."[10]

Wachovia Bank, N.A.

Wachovia Bank, N.A. (Wachovia Bank) is a national ba whose main office is located in Charlotte, North Carolina.

Under federal law, a national bank is 1) a deposit institution that 2) has applied for and received a Certificate Authority (federal charter) from the OCC to conduct the busin of banking, 3) is eligible to become a Federal Reserve Mem Bank, and 4) is eligible to obtain federal deposit insurance fr

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[7] MCL 493.51 *et seq.*

[8] MCL 445.1661.

[9] MCL 445.1675(a).

[10] *People v Greenberg*, 176 Mich App 296, 299; 439 NW2d 336 (1989).

he Federal Deposit Insurance Corporation (FDIC). See 12 USC § 21-27, 221, 221a, 282, 1813(c)(2), 1814-16.

Wachovia Bank has no physical presence in the State of Michigan. It has no branch offices in Michigan, in contrast to the branch offices it has in some 17 other States throughout the country.

Wachovia Mortgage Corporation

Wachovia Mortgage Corporation (Wachovia Mortgage) is a State chartered, non-bank, operating subsidiary corporation of Wachovia Bank. It is a corporation organized under the laws of the State of North Carolina.

Wachovia Mortgage Corporation enjoys a separate and distinct corporate status from its parent, Wachovia Bank. Wachovia Mortgage is not a depository institution, has no federal banking charter, and is not eligible to become a federal reserve member bank or to obtain federal deposit insurance.

From March 27, 1997 to January 1, 2003, Wachovia Mortgage (previously named First Union Mortgage Corporation) had "registered" in Michigan to engage in the business of making first mortgage loans under the MBLSLA.[11]

Large national banks conduct mortgage lending business through separate and distinct operating subsidiary corporations in order to protect and insulate the parent bank from the risks of loss and liability created by mortgage loans.

Wachovia Mortgage holds a Certificate of Authority to transact business as a Foreign Profit Corporation in Michigan. Foreign non-bank corporations, like Wachovia Mortgage, are required to procure a Certificate of Authority in Michigan before

[11] MCL 445.1651 *et seq.*

transacting business.[12] Wachovia Mortgage and its predeces corporations have filed Michigan Annual Reports for Fore Profit Corporations with the Michigan Corporation Division si 1984. Wachovia Mortgage has never asserted an exemptior characterized itself as a "bank," in its filings with Michi Corporation Divisions, even though Michigan's Busin Corporation Act does not apply to banking corporations.[13]

Under the MBLSLA, Wachovia Mortgage is not requirec be "licensed." Rather, as a subsidiary of a depository institut (Wachovia Bank), Wachovia Mortgage is granted an except from licensure and need only "register" with the Commissione the Michigan Office of Financial and Insurance Services (OFI Wachovia Mortgage would not be required to register Wachovia Bank had a "main office" or a "branch office" Michigan.[14]

State authority over non-bank operating subsidiaries national banks is specifically limited. Under MBLSLA registrant like Wachovia Mortgage, unlike a licensee, is exer from 1) the license application process and extensive backgrou investigation of its officers, directors, shareholders, partners, affiliates; 2) proof of financial responsibility; 3) minimum worth requirements; 4) annual examination by the Ol Commissioner; 5) certain requirements regarding the transfer assigning of mortgages; and 6) complaint investigations, unl the complaint is not being adequately pursued by the appropri federal regulatory authority.[15]

Prior to January 1, 2003, Wachovia Mortgage was a whol owned subsidiary of Wachovia Corporation, a financial hold

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[12] MCL 450.2011, MCL 450.2015.

[13] MCL 450.1123(2).

[14] MCL 445.1656(1)(d).

[15] MCL 445.1656(2) and (3); MCL 445.1653 – MCL 445.1655; M 445.1679(1)(b) and (c); MCL 445.1663(2).

company which also owned Wachovia Bank, N.A. By letter dated April 3, 2003, Wachovia Mortgage notified OFIS that on January 1, 2003, Wachovia Mortgage became an operating subsidiary corporation of Wachovia Bank. Wachovia Mortgage declared in that letter that it would henceforth engage in its mortgage lending and servicing activities in Michigan "as authorized by regulations of the OCC." In claiming exemption from State regulation, Wachovia Mortgage asserted that ". . . these [Michigan's] registration requirements would not apply to a national bank and **therefore cannot be applied to an operating subsidiary of a national bank**." [bracket inserted] (emphasis added)

By letter dated June 23, 2003, Mark W. Weigold of OFIS, notified Wachovia Mortgage that without a registration pursuant to MBLSLA, it would no longer be authorized to conduct its mortgage lending activities in Michigan as of July 1, 2003, the date of expiration. After July 1, 2003, Wachovia Mortgage also began to engage in the business of making secondary mortgage loans in Michigan.

Michigan contends that the National Bank Act does not grant authority to the OCC to preempt State law through a regulation granting to State-chartered nonbank operating subsidiaries all of the immunities from State oversight that may be available to federally-chartered national banks.

In response to plaintiff's summary judgment motion, the district court issued an opinion which found that the limitation on visitorial power over national banks contained in 12 USC § 484(a) of the National Bank Act was "extended" by 12 CFR 7.4006, to State-chartered non-bank operating subsidiaries of national banks, and that the OCC's rule was entitled to deference under *Chevron*.[16] Plaintiffs' claim for attorney fees under 42 USC § 1983 was denied.

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[16] *Chevron*, 467 US at 837.

The United States Court of Appeals for the Sixth Cir affirmed, holding that the district court appropriately conduc its analysis pursuant to *Chevron* and concluded that regulations were within the OCC's authority and were reasonable interpretation of 12 USC § 484(a).

As a result, Michigan's MBLSLA and SLA regulating Wachovia Mortgage were declared preempted by 12 USC 484(a) and 12 CFR 7.4006 and Michigan was permaner enjoined from enforcing its State laws against Wacho Mortgage.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals erroneously granted *Chevr* deference to the OCC's regulation declaring that t National Bank Act preempts State law regulati State-chartered nonbank operating subsidiaries national banks in the area of mortgage lending. deferring to the OCC, the Court of Appeals decisio in conflict with the Tenth Circuit and decisions of t Court.

A. The OCC's preemptive interpretation of t National Bank Act as expressed in 12 CFR 7.40 does not qualify for *Chevron* deference because USC § 484(a) is clear and unambiguous, and t OCC's regulation therefore violates t unambiguously expressed intent of Congress.

The statutory anchor upon which this whole controversy re is 12 USC § 484(a), which provides that "no national bank sh be subject to any visitorial powers except as authorized by fede law." Visitorial powers include the examination and inspecti of a national bank's books and records. The OCC, by adopting CFR 7.4006, has declared its belief that the exclusive visitor powers it has over national banks should be extended to the Sta chartered nonbank operating subsidiaries of national banks. CFR 7.4006 provides that: "Unless otherwise provided Federal law or OCC regulation, State laws apply to national ba

operating subsidiaries to the same extent that those laws apply to the parent national bank."

By its express terms, 12 USC § 484(a) applies only to "national banks." The words are clear and unequivocal. They should be held to mean what Congress says they mean. Congress has defined a "national bank" in the National Bank Act. A "national bank" is a depository institution that (1) has applied for and received a charter from the OCC to conduct the business of banking, (2) is eligible to become a Federal Reserve member bank, and (3) is eligible to obtain federal deposit insurance from the FDIC.[17] Wachovia Mortgage has none of these indicia.

A "national bank" cannot come into existence without complying with the provisions of the national bank laws. Not only does it owe its existence to these laws, but it also is specifically governed by them in all aspects, including its corporate powers.[18] An operating subsidiary incorporated by a State government is not a national bank. It is neither created pursuant to the national bank laws nor is it governed by these laws for purposes of corporate governance. It does not need a certificate from the OCC to conduct business, and it cannot become a member of the Federal Reserve System.

Chevron[19] does not permit the OCC to ignore the statutory definition of "national bank" and to invent a new definition that expands its preemptive reach under the National Bank Act.[20] *Chevron* says that if the law passed by Congress is clear and

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[17] 12 USC §§ 21-24, 26, 27, 221, 221a, 282, 501a, 1814 and 1815.

[18] 12 USC § 24.

[19] *Chevron*, 467 US at 842-843.

[20] *See* Arthur E. Wilmarth, Jr., *Preemption – OCC v Spitzer: An Erroneous Application of Chevron That Should Be Reversed*, BNA's Banking Report, Vol. 86, No 8, 379 (Feb. 20, 2006), and Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Annual Review of Banking and Financial Law 225 (2004).

unambiguous, it must be applied as written. Under the first s of *Chevron*, a reviewing court must determine "whether Congr has directly spoken to the precise question at issue" and, if so, Court must reject an agency interpretation of a statute tha contrary to the unambiguously expressed intent of Congress[21]. however, the Court determines that "Congress has not direc addressed the precise question at issue," the court must deci under the second step of *Chevron* whether "the agency's answe based on a permissible construction of the statute.[22] This Cour *Chevron* also stated[23]:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. [Citations omitted.]
>
> ***
>
> If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

In applying "step one" of *Chevron* the District of Colum Circuit has held that a reviewing court must "evaluate the statu clarity [itself], giving no deference to the agenc interpretation."[24]

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[21] *Chevron*, 467 US at 843.

[22] Chevron, 467 US at 842-43. In a manner similar to the decision bel Chevron deference to 12 CFR 7.4006 was also erroneously applie *Wachovia Bank v Burke*, 414 F3d 305 (2d Cir 2005), petition for cert filed, 05-431 (US, Sept. 30, 2005); *Wells Fargo Bank, NA v Bou* 419 F3d 949 (9th Cir 2005), *National City Bank of Indiana v Turnba* 367 F Supp 2d 805 (D Md, 2005), appeal pending, No 05-1647 (4th Cir).

[23] *Chevron*, 467 US at 843, note 9.

[24] *AFL-CIO v Federal Election Comm'n*, 333 F3d 168, 173 (DC Cir 200

In *ACLU v FCC*,[25] the same Court struck down a rule adopted by the Federal Communications Commission that altered the statutory definition of "basic cable service" and thereby greatly increased the FCC's power to preempt the rate-setting authority of local communities. The Court held that "Congress has spoken directly and specifically by providing a definition of the exact term that the [FCC] now seeks to redefine."[26] The Court emphasized that its scrutiny was considerably heightened by the fact that the agency sought to expand a key jurisdictional term and thereby extend its power to preempt local authorities[27]:

> Thus, the definition of "basic cable service" sets the parameters of the respective jurisdictions of local franchising authorities and the FCC. The fact that construction of the statutory term directly impacts such jurisdictional determinations should, in our view, be factored into a proper analysis of the statutory issue we face. *Cf. Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 106 S. Ct. 681, 88 L. Ed. 2d 691 (1986), n32 ("When an agency's assertion of power into new arenas is under attack, therefore, courts should perform a close and searching analysis of congressional intent, remaining skeptical that Congress did not speak to such a fundamental issue"). That issue may be simply stated. Does the FCC enjoy discretion to adopt, as part of its regulations implementing the Cable Act, a definition of a particular term that is at odds with the definition of that very term contained in the Act itself? The question, we believe, answers itself.

In *Lamie v United States Trustee*,[28] this Court stated:

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[25] *ACLU v FCC*, 823 F2d 1554 (DC Cir 1987).

[26] *ACLU v FCC*, 823 F2d at 1570.

[27] *ACLU v FCC*, 823 F2d at 1567.

[28] *Lamie v United States Trustee*, 540 US 526, 534 (2004).

> The starting point in discerning Congressional intent is the existing statutory text . . . and not the predecessor statutes. It is well established that "when the statute's language is plain, the sole function of the court's--at least where the disposition required by the text is not absurd--is to enforce it according to its terms. [Citations omitted]

In *Board of Governors of the Federal Reserve Systen Dimension Financial Corp*,[29] this Court struck down a regulat of the Federal Reserve Board ("FRB") which sought to redef the statutory definition of "bank" set forth in the Bank Hold Company Act ("BHC Act"). In that case, the FRB argued t "nonbank banks" were "functionally equivalent to 'banks'" jus the OCC has claimed in 12 CFR 7.4006 that operat subsidiaries are "functionally identical to their parent [natior banks." In *Dimension* the FRB contended that its redefinitior "bank" was necessary to accomplish the "plain purpose" of BHC Act, just as the OCC argues here that its redefinition "national bank" is necessary to carry out principles of National Bank Act. In *Dimension*, however, this Court held th federal agency has no authority to expand the limits of authority by altering a jurisdictional term set forth in governing statute, regardless of how strongly the agency belie in its policy arguments.[30]

Likewise, in *Minnesota v Fleet Mortgage Corp*,[31] the Cc rejected the OCC's claim that "operating subsidiaries functionally equivalent to a department or division of the b itself" and therefore should be treated as "banks" under § 3 of Federal Deposit Insurance Act.[32] The Court pointed out that

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[29] *Board of Governors of the Federal Reserve System v Dimension Finar Corp*, 474 US 361 (1986).

[30] *Board of Governors v Dimension*, 474 US at 368, 373, 374.

[31] *Minnesota v Fleet Mortgage Corp*, 181 F Supp 2d at 995 (D Minn 20

[32] 12 USC § 1813.

lefinition of "bank" in 12 USC § 1813(a)(1)(A) "does not include ıational bank operating subsidiaries."[33] The Court refused to lefer to the OCC's position that operating subsidiaries are equivalent to banks, because "there is no ambiguity present in this lefinition [of 'bank']. The definition of "bank" identified by Congress simply does not include subsidiaries of banks."[34]

Congress has made clear that operating subsidiaries must be treated as "affiliates" under 12 USC § 221a(b). The unambiguous terms of 221a(b) define "affiliate" to include "any corporation" controlled by a national bank. This statutory definition of "affiliate" clearly includes operating subsidiaries, because they are corporations controlled by National banks.[35]

Under 12 USC §§ 161(c) and 481, the OCC may obtain reports from and examine "affiliates" in order to assess a national bank's relationships with its affiliates. In sharp contrast to 161(c) and 481, 12 USC § 484(a) limits the exercise of visitorial powers only with respect to national banks and does not mention "affiliates." Similarly, 161(c) and 481 do not place any restriction on the states' authority to regulate affiliates.

12 USC § 484 was most recently amended on January 12, 1983 by P.L. 97-457, § 23a, 96 Stat. 2510. At that time, Congress had an opportunity to amend 12 USC § 484 to limit the exercise of visitorial powers over "affiliates" (including operating subsidiaries) which have been part of the national bank laws since the Banking Act of 1933.[36] The OCC first adopted its rule allowing national banks to establish operating subsidiaries in 1966. Yet, Congress did not include language referring to

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[33] *Minnesota v Fleet Mortgage*, 181 F Supp 2d at 998.

[34] *Minnesota v Fleet Mortgage*, 181 F Supp 2d at 1000.

[35] See 12 CFR 5.34(e)(2)

[36] *See* S Rep No 77, 73d Cong., 1st Sess. 10 (1933), (declaring that Congress intended "[t]o separate as far as possible national . . . banks from affiliates of all kinds").

operating subsidiaries or other affiliates in the 1983 amendm to 12 USC § 484, or in the preceding 1982 amendment to 12 U § 484 (P.L. 97-320, § 412, 96 Stat. 1521). Congress is presum to have acted purposefully when it omits language in c statutory provision that is included in another.[37] Sections 161(481 and other provisions of the national banking la demonstrate that Congress has made a careful distinction betw a national bank and an affiliate like an operating subsidiary t carries on particular aspects of the banking busines Subsidiaries controlled by national banks are separat incorporated entities and have a separate legal status from th parent banks.

Under traditional rules of statutory construction, it must presumed that Congress' omission of any reference to "affiliat in 12 USC § 484(a) means that Congress did not intend to exte the preemptive scope of that statute to reach State-charte nonbank operating subsidiaries.[39] In fact, the OCC did not cla that operating subsidiaries were immune from state regulati until it adopted 12 CFR 7.4006 in 2001, long after the most rec amendments to 12 USC § 484.

The OCC does not possess any independent power to preen State law. And the OCC is not free to preempt Michigan's l under the guise an "incidental power" under 12 USC § (Seventh) by creating a preemptive regulation that it decide wants. Incidental powers are those that are necessary to carry the business of banking – but they must be within the limitati prescribed by the National Bank Act. An incidental power m find its genesis from an express power. If there is no ne between an incidental activity and an express power, the activ is not authorized as an incidental power.

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[37] *Chicago v Environmental Defense Fund*, 511 US 328, 338 (1994).

[38] 12 USC §§ 52 & 221a(b); *See* S Rep No 77, 73d Cong., 1st Sess. 10 (19 (declaring that Congress intended "[t]o separate as far as possible national banks from affiliates of all kinds")

[39] *See Keene Corp v United States*, 508 US 200, 208 (1993).

The right to interpret the "incidental powers" of a national bank does not give the OCC any authority to treat an operating subsidiary as the functional equivalent of a national bank. As this Court has observed, 12 USC § 24 (Seventh), "by its terms applies only to banks" while [o]rganizations affiliated with banks . . . are dealt with by other sections of the 1933 Act."[40] While the term "incidental powers" may be broad, it must be interpreted in light of other provisions of the national banking law. In *American Land Title Ass'n v Clarke*,[41] the Second Circuit determined that § 24 (Seventh) must be interpreted in light of 12 USC § 92, which imposes specific limitations on the insurance activities of national banks. Similarly, Congress has provided specifically for the governance of affiliates, including operating subsidiaries, in 12 USC §§ 221a(b), 161(c) and 481. Congress has carefully separated national banks from their affiliates (including operating subsidiaries), and the general incidental powers of national banks cannot justify the OCC's effort to obliterate the distinction established by Congress between national banks and their affiliates.

For example in *First National Bank in St. Louis v Missouri*,[42] this Court held that national banks did not possess any "incidental power" to establish branches under the predecessor statute to § 24 (Seventh). The Court pointed out that the statutes expressly addressing branch banking allowed national banks to operate branches only in very limited circumstances. The Court then held that "it is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power."[43]

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[40] *Board of Governors v Investment Company Institute*, 450 US 46, 58-59, n. 24 (1981).

[41] *American Land Title Ass'n v Clarke*, 968 F2d 150, 157 (2d Cir 1992); *cert den* 508 US 971.

[42] *First National Bank in St. Louis v Missouri*, 263 US 640 (1924).

[43] *First National Bank in St. Louis v Missouri*, 263 US at 656-58 (quote at 658).

This Court has also made clear that a careful examinatio congressional intent is required in every case where a fed agency claims authority to issue regulations preempting S law. The Court declared in *Louisiana Public Service* that "[t critical question in any pre-emption analysis is always whe Congress intended that federal regulation supersede State law Accordingly, while a specific statutory statement of congressi intent to preempt State law is not necessary, the OCC's regula cannot be upheld unless the governing statutes indicate Congress contemplated the result advocated by the OCC in CFR 7.4006. This Court has further emphasized tha preemptive agency regulation is invalid unless Cong delegated authority that would permit the agency to override S laws, holding that "an agency literally has no power to act, alone pre-empt the validly enacted legislation of a sover State, unless and until Congress confers power upon it,"[45] and agency may not bootstrap itself into an area in which it ha jurisdiction by repeatedly violating its statutory mandate."[46]

This Court has applied a general presumption aga preemption in fields involving traditional State regulation.[4 cases where federal law is alleged to preempt an area traditional state concern, this Court has said that "congressi intent to supersede State laws must be 'clear and manifest That clear and manifest intent does not exist in this case.

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[44] *Louisiana Public Service Commission v FCC*, 476 US 355,369 (198

[45] *Louisiana Public Service Commission v FCC*, 476 US at 374.

[46] *SEC v Sloan*, 436 US 103, 119 (1978).

[47] *Medtronic v Lohr*, 518 US 470, 475, 484-485 (1996).

[48] *English v General Electric Co*, 496 US 72, 79 (1990).

B. The OCC's preemptive interpretation of the National Bank Act is not based on a permissible construction of 12 USC § 484(a).

12 CFR 7.4006 is not based on a permissible construction of the national bank laws. It is impermissible because it preempts historic police powers of the State of Michigan without any clear and manifest expressed intent by Congress to do so. It is also an impermissible construction of the national bank laws because it ignores fundamental concepts of corporate law, including the legal separation between a parent corporation and its subsidiaries. Finally, it is impermissible because it is contrary to the legal foundation upon which the national bank laws were drafted, which requires a national bank to be a national corporation formed pursuant to federal law.

The OCC's regulation eliminates any ability of the State of Michigan to regulate a State-chartered nonbank operating subsidiary of a national bank conducting a mortgage business within Michigan. Historically, pursuant to their police powers, the States have been able to regulate the corporations which operate within their boundaries.[49] A court engaged in a preemption analysis must assume that the historic police powers of a State are not to be preempted by federal laws unless it is the "clear and manifest purpose of Congress" to do so.[50] The power of the federal government to preempt State laws is an extraordinary power. When analyzing the OCC's authority to promulgate 12 CFR 7.4006, this Court must assume that Congress does not exercise its power to preempt State laws lightly.[51]

Congress has recognized that Michigan, and other States, have long exercised police powers to protect consumers,

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[49] *E.g.,CTS Corpv Dynamics Corp of America,*481 US 69 (1987); *Union Brokerage Co v Jensen,* 322 US 202 (1944).

[50] *Rice v Santa Fe Elevator Corp*, 331 US 212, 230 (1947).

[51] *Gregory v Ashcroft*, 501 US 452, 460 (1991).

businesses and communities from abusing practices involv providers of financial services, including national banks. In 19 when Congress adopted the Riegle-Neal Interstate Banking Branching Efficiency Act of 1994,[52] the Conference Report the Act declared:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses and communities. . . .
>
> Under well-established judicial principles, national banks are subject to State law in many significant respects. . . . Courts generally use a rule of construction that avoids finding a conflict between the federal and State law where possible. The [Riegle-Neal Act] does not change these judicially established principles. H.R. Rep. No. 103-651 (Conf. Rep.), at 53 (1994), reprinted in 1994 U.S. Code Cong. & Ad. News, 2068, 2074.

The National Bank Act was not intended to divest all St authority over national banks. Indeed, from its earliest decisi involving the NBA, the U.S. Supreme Court has recognized a upheld the applicability of State laws to national banks numerous cases. In 1870, the Supreme Court rejected a ban preemption challenge to a State's collection of a bank shares t declaring that national banks "are subject to the laws of the St and are governed in their daily course of business far more by laws of the State than of the nation . . . . It is only when the St law incapacitates the banks from discharging their duties to government that it becomes unconstitutional."[53] In *McClella*

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[52] Riegle-Neal Interstate Banking & Branching Efficiency Act of 1994, Pu No 103-328, 108 Stat 2338.

[53] *National Bank v Commonwealth*, 76 US 353, 361-62 (1870).

Chipman,[54] this Court rejected a bank's assertion that "national banks in virtue of the NBA are entirely removed, as to all their contracts, from any and every control by the State law," holding instead that State laws govern the business transactions of national banks except in areas where Congress expressly preempts State law or State law would impair the banks' efficiency, frustrate the purpose for which they were created, or amount to undue State interference in carrying out their duties imposed by federal law. Other Supreme Court decisions affirm the principle that national banks remain subject to many State laws.[55] And there is nothing to indicate that Congress intended to totally preempt Michigan's authority to regulate a State-chartered nonbank operating subsidiary of a national bank.

A parent corporation and its subsidiary are distinct legal entities.[56] During the promulgation of 12 CFR 7.4006, the OCC stated that operating subsidiaries are "in essence, incorporated

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[54] *McClellan v Chipman*, 164 US 347, 359 (1896).

[55] *See e.g., Davis v Elmira Savings Bank*, 161 US 275, 290 (1896) ("Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating State laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purpose of Congressional legislation."); *First National Bank in St. Louis v Missouri*, 263 US 640, 656 (1924) (National banks "are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States."); *Anderson National Bank v Luckett*, 321 US 233, 244-54 (1944) ("National banks are subject to State laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions," holding that a State statute administering abandoned deposit accounts did not "unlawful[ly] encroach[h] on the rights and privileges of national banks."); *Franklin National Bank v New York*, 347 US 373, 378 n 7 (1954) ("National banks may be subject to some State laws in the normal course of business if there is no conflict with federal law."). More recently, in *Atherton v FDIC*, 519 US 213, 222-23 (1997), the Supreme Court reaffirmed the principle that "federally chartered banks are subject to State law," based on its earlier decisions.

[56] *Dole Food v Patrickson*, 538 US 468, 474 (2003); *United States v Bestfoods*, 524 US 51, 61 (1998).

departments or divisions of the [parent] bank."[57] It is impermissible construction of the national bank laws to treat operating subsidiary as a mere division of a national bank direc contrary to fundamental corporate law throughout the Uni States. The national banking laws recognize affiliates, includ operating subsidiaries, as separate and distinct legal entities fr a national bank.[58] Accordingly, the OCC's attempt to blurr legal distinction between a State-chartered nonbank operat subsidiary and its parent national bank by promulgating 12 C 7.4006 is contrary to the national banking laws which must g the OCC its authority to issue regulations.

The Michigan Business Corporation Act[59] was enac January 1, 1973. Chapter 10 of the Michigan Busin Corporation Act pertains to the regulation of foreign corporati such as Wachovia Mortgage Corporation. Michigan a regulates domestic and foreign corporations pursuant to mortgage laws such as the MBLSLA and the SMLA. Autho to regulate these entities under these acts is pursuant to traditic police powers of the sovereign State of Michigan.

Wachovia Mortgage did not come to Michigan and apply a certificate of authority to transact its business claiming it wa national bank. It did not claim it was a national bank whe filed its 2005 annual report with Michigan or in any ot previous year. If it could have shown it was a national bank, Michigan Corporations Division would have been divested jurisdiction because the Michigan Corporation Act does not ap to banks.[60] When Wachovia Mortgage was granted a certific of authority to do business in Michigan under the Michi Business Corporation Act, it became authorized to transac Michigan any business of the character set forth in its applicat

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[57] 66 Fed Reg 34788 (2001).

[58] 12 USC § 221a(b)(1, 52, 161)(c).

[59] MCL 450.1101 *et seq.*

[60] MCL 450.1123.

which a domestic corporation formed under this act may lawfully transact.[61] Large national banks make a business judgment to conduct their mortgage lending business through operating subsidiaries in order to protect the parent banks from the risks of loss and liability created by mortgage loans.[62] If a State-chartered nonbank operating subsidiary was actually the functional equivalent of national bank - which it is not, the operating subsidiary would not qualify under Michigan's corporation law to receive a certificate of authority as a foreign corporation. This would effectively eliminate the corporate separation protections that have encouraged national banks to conduct business through operating subsidiaries. It is unlikely that Wachovia Bank would claim it is legally indistinguishable from its operating subsidiary if Wachovia Bank learned that its subsidiary had engaged in mortgage fraud, predatory lending, breaches of fiduciary duty, or other unlawful activities resulting in potential liability. As the Supreme Court said in *First National Bank v Walker Bank & Trust*[63]: "It is a strange argument that permits one to pick and choose what portions of the law binds him." Wachovia Bank cannot have it both ways. It cannot claim to be separate from Wachovia Mortgage for legal liability purposes, and, at the same time, to be identical to Wachovia Mortgage for preemption purposes.

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[61] MCL 450.2016; MCL 450.1107(1).

[62] *See Wilmarth, OCC's Preemption Rules, supra* note 23, at 359 (quoting amicus brief filed by the American Bankers Ass'n et al.

[63] *First National Bank v Walker Bank & Trust*, 385 US 252, 261 (1966).

C. The Court of Appeals decision is in conflict w the Tenth Circuit in *Colorado Public Utilit Commission v Harmon*, fails to consider t Court's decision in *Smiley v Citibank* and t District of Columbia Circuit decision *American Bar Association v Federal Tra Commission*, and is not consistent with t Court's recent decision in *Gonzales v Oreg*

Citing *NationsBank v Variable Annuity Life Insura Company*,[64] the Court of Appeals viewed this case through framework of *Chevron*, stating that if the Comptroll interpretation is reasonable, it must defer to its construction of statute.[65] However, neither *NationsBank* nor *Chevron* itself w preemption cases.

The preemptive effect of a statute is a legal question wit the expertise of the courts – not a federal agency. In *Colora Public Utilities Comm v Harmon*,[66] the Court acknowled deference generally in regard to an agency's interpretation statutes and regulations. However, in deciding to **independen** review the legal issue of preemption of federal regulation o State regulations, the Court stated that "a preempt determination involves matters of law – an area more within expertise of the courts" than within the expertise of the agenc

While this Court has not ruled definitively on the questior whether the *Chevron* doctrine applies to preempt determinations, its decision in *Smiley v Citibank* is instructive should have been considered by the Sixth Circuit. There, Court considered the "substantive" (as opposed to preempti

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[64] *Nationsbank v Variable Annuity*, 513 US 251 (1995).

[65] *Wachovia Bank, N.A. v Watters*, 431 F3d at 562.

[66] *Colorado Public Utilities Commission v Harmon*, 951 F2d 1571 (10th 1991.

[67] *Colorado Public Utilities Comm v Harmon*, 951 F2d at 1579.

meaning of a statute, as distinguished from the question of whether a statute is pre-emptive. In deciding whether the OCC reasonably interpreted the term "interest" contained in 12 USC § 85 to include late-payment fees, this Court applied the "ordinary rule of deference" under *Chevron* in determining the substantive meaning of the federal statute.[68] However, as to the applicability of *Chevron* on the question of whether a federal statute is preemptive, the Court stated that:

> We may assume (without deciding) that the latter question [question of whether a statute is preemptive] must always be decided *de novo* by the Courts.[69]

The Court of Appeals did not decide this preemption case *de novo* but instead, granted deference to the OCC's regulation under "step 2" of *Chevron*.

This Court, in *Gonzales v Oregon,* rejected an open-ended claim for deference by the United States Attorney General. In holding that the Controlled Substance Act (CSA) does not allow the Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide under State law permitting the procedure, the Court held[70]:

> *Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official.
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[68] *Smiley v Citibank (South Dakota) N.A.*, 517 US 735, 740 (1996).

[69] *Smiley v Citiban (South Dakota), N.A.*, 517 US at 744 (emphasis added; bracket inserted).

[70] *Gonzales v Oregon*, ___US___; 126 S Ct 904, 916, 921, 923, 925; 163 L Ed 2d 748 (2006) (citations omitted).

> The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions -- it does not, one might say, hide elephants in mouseholes."
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> * * *
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> [T]he statute manifests no intent to regulate the practice of medicine generally. The silence is understandable given the structure and limitations of federalism, which allow the States "'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'"
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> * * *
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> Just as the conventions of expression indicate that Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints, the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power.

In *American Bar Association v Federal Trade Commissi* the District of Columbia Circuit refused to give *Chevi* deference to a regulation of the Federal Trade Commission t attorneys engaged in the practice of law were "financ institutions" subject to the customer privacy provisions of Gramm-Leach-Bliley Financial Modernization Act. The Cour *ABA* rejected the FTC's "attempted turf expansion" and assertion that its regulation was entitled to step-two defere under *Chevron* when the federal statute does not expressly neg the existence of a claimed administrative power.

> Federal law "may not be interpreted to reach into areas of State sovereignty unless the language of the federal

> law compels the intrusion." [otherwise put] . . . "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"
>
> As we have often cautioned, "to suggest, as the [Commission] effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power . . . is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent." Plainly, if we were "to *presume* a delegation of power" from the absence of "an express *withholding* of such power, agencies would enjoy virtually limitless hegemony. . . .[71]

Thus, both *Gonzales* and *American Bar Association* establish that mere statutory ambiguity is not sufficient to warrant deference under *Chevron* "step two," especially when a federal agency seeks to deny or severely restrict the right of a State to exercise its police powers to protect the public interest, as occurred in this case. The Court of Appeals concluded that "Congress has not spoken precisely on the issue."[72] Yet, the Court wrongly applied *Chevron* deference to allow the OCC to preempt all state regulation of a large class of State-charted corporations. In view of *Gonzalez* and *ABA v FTC* the Court of Appeals clearly erred in granting deference to the OCC's regulation.

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[71] *American Bar Association v Federal Trade Commission*, 430 F3d 457, 471-472, 468 (DC Cir 2005). The District of Columbia Circuit's decision was issued on December 6, 2005, only thirteen days before the Sixth Circuit issued its initial opinion in this case, and no party brought that decision to the Sixth Circuit's attention.

[72] *Wachovia Bank, N.A. v Watters*, 431 F3d at 561.

II. 12 CFR 7.4006 intrudes on State sovereignty violation of the Tenth Amendment of the United Sta Constitution in an area of consumer protection critical importance to the States.

The Court of Appeals decision exempts State-charte nonbank operating subsidiaries of national banks from Michig consumer protection regulation and enforcement under th mortgage laws. 12 CFR 7.4006 essentially federalizes a St corporation by converting it into an instrumentality of fede law. Such an effort is a significant intrusion on State sovereig and is a violation of the Tenth Amendment[73] by co-opting a ability of a State to regulate the State corporation to protect citizens.

In promulgating 12 CFR 7.4006 the OCC has abolished distinction between a national bank, a creation of federal law, a a State corporation, a creature of State law. Without question, risk aversion aspects of the separate and distinct legal entities national bank and its operating subsidiary convey a signific advantage to the parent bank. In fact, this legal protection fr risk directly results from the fact that the operating subsidiary separate legal entity, created under State law, from the nationa chartered bank parent. Such protection would not exist if operating subsidiary were merely "a division or department" the national bank. "It is a general principle of corporate l deeply 'ingrained in our economic and legal systems' that a par corporation . . . is not liable for the acts of its subsidiary Federal statutes are presumed to incorporate this fundamer tenet of corporate law, and "congressional silence" does not all a court to "reject this bedrock principle."[75]

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[73] US Const, Amend X.

[74] *United States v Bestfoods*, 524 US 51, 61 (1998).

[75] *United States v Bestfoods*, 524 US 51, 61-62 (1998); *accord, Dole Food v Patrickson*, 538 US 468, 474-76 (2003).

Any question regarding the power of a federal agency to intrude on a State's sovereignty can, and should, be avoided wherever possible. In *Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers*,[76] this Court stated:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of Congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional State power.

The District of Columbia Circuit has held that "the constitutional avoidance canon of statutory interpretation trumps *Chevron* deference,"[77] and that this limitation on deference applies at either "step one" or "step two" of the *Chevron* analysis.[78]

12 CFR 7.4006 significantly intrudes upon the States' ability to control entities created by the States. In *Hopkins Federal Savings & Loan Ass'n v Cleary*, this Court found that a portion of the Home Owners' Loan Act violated the Tenth Amendment "to the extent that it permits the conversion of State associations into federal ones in contravention of the laws of the place of their creation."[79] In so holding, this Court stated that: "It extends in

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[76] *Solid Waste Agency of Northern Cook Country v United States Army Corps of Engineers*, 531 US 159, 172-173 (2001)(citations omitted).

[77] *University of Great Falls v NLRB*, 278 F3d 1335, 1340-41 (DC Cir 2002).

[78] *AFL-CIO v Federal Election Comm'n*, 333 F3d 168, 175, 179-80 (DC Cir 2003).

[79] *Hopkins Federal Savings & Loan Ass'n v Cleary*, 296 US at 335.

that view to moneyed corporations generally and even to oth corporations, if Congress chooses to convert them into creatu of the federal government."[80]

In addition, "[n]o principle of corporation law and practic more firmly established than a State's authority to regul domestic corporations, including the authority to define voting rights of shareholders."[81] In addition, this Court h further affirmed that each State may enact and enforce la designed to "assur[e] responsibility and fair dealing on the par foreign corporations coming into a State."[82] Both this Court a Congress have recognized that States have a heightened inter in regulating corporations that provide financial services, beca "banking and related financial activities are of profound lo concern. [S]ound financial institutions and honest financ practices are essential to the health of any State's economy and the well-being of its people."[83]

Despite this consistent recognition of State authority regulate corporate activities – particularly those involv financial services – § 7.4006 divests the States of all power regulate State-chartered corporations that are owned by natio banks. Under that interpretation, 12 CFR 7.4006 bars **all** St officials – including State Attorneys General and State bank commissioners – from regulating State-chartered operat subsidiaries in any way. Wachovia and the OCC cannot poin any federal statute granting the OCC explicit power to destroy States' authority over this impo tant category of State-charte corporations.[84]

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[80] *Hopkins Federal Savings & Loan Ass'n v Cleary*, 296 US at 335.

[81] *CTS Corp v Dyamics Corp of Americ*, 481 US 69, 89 (1987).

[82] *Union Brokerage Co v Jensen*, 322 US 202, 210-11 (1944).

[83] *Lewis v BT Investment Manager, Inc*, 447 US 27, 38 (1980); *accord*, Rep No. 103-651 (Conf Rep), at 53 (1994), *reprinted in* 1994 USCCAN 2(2074.

[84] In 2004, a congressional committee criticized the OCC's efforts to pree the authority of State officials to enforce consumer protection laws aga

The practical effect of 12 CFR 7.4006 is to transform State-chartered operating subsidiaries into "creatures of the federal government" without the permission of the chartering States.[85] By doing so §7.4006 clearly infringes on sovereign State interests protected by the Tenth Amendment.[86] Consequently, § 7.4006 has no claim to deference under *Chevron*, because (1) § 7.4006

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national banks and their operating subsidiaries. The committee recognized the important contributions made by State officials in protecting consumers against abusive financial practices. The committee also questioned whether the OCC possessed sufficient resources to enforce consumer protection laws, in view of the agency's "primary mission of ensuring the safety and soundness of the national bank system":

> The new [OCC] rules necessitate that the OCC investigate all consumer complaints for 2150 national banks in the 50 States from a single customer assistance center. . . . There are currently only 40 full time staff members allocated for these tasks at the OCC. In contrast, according to the Conference of State Bank Supervisors, State banking agencies and State attorney generals' offices employ nearly 700 full time examiners and attorneys to monitor and enforce consumer law compliance. In the area of abusive mortgage lending practices alone, State bank supervisory agencies initiated 20,332 investigations in 2003 in response to consumer complaints, which resulted in 4,035 enforcement actions.
>
> In order to fulfill this vastly increased portfolio of regulatory responsibilities, the Committee is concerned that the OCC will be forced to utilize funds designated for other purposes to engage in consumer law enforcement activities that typically have been undertaken by the States. . . . The Committee is concerned that such action could weaken the OCC's ability to carry out its primary mission of ensuring the safety and soundness of the national bank system and implementing other critical Congressional mandates in Federal law.

House Comm. on Financial Services, "Views and Estimates of the Comm. on Financial Services on Matters to Be Set Forth in the Concurrent Res. on the Budget for Fiscal Year 2005, 108th Cong., 2d Sess. 16 (Comm. Print, Feb. 25, 2004). *See also* Wilmarth, OCC's Preemption Rules, supra note 23, at 314-16, 348-56 (contending that State officials have been far more effective than the OCC in protecting consumers against predatory lending and other abusive financial practices).

[85] *Hopkins Federal Savings & Loan Ass'n v Cleary*, 296 US at 335.

[86] *Hopkins Federal Savings & Loan Ass'n v Cleary*, 296 US at 335-40.

"alters the federal-State framework by permitting fede encroachment upon a traditional State power" and (2) neitl Wachovia nor the OCC can show "a clear indication tl Congress intended that result"[87] Even the Sixth Circuit concluc that Congress has not spoken precisely on the issue. preempting Michigan's laws as to State-chartered nonba operating sub idiaries of national banks, the OCC's regulati exceeded the agencies statutory authority and must not allowed to stand.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted

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Dated: April, 2006

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[87] *Solid Waste Agency of Northern Cook County v United States Army C of Engineers*, 531 US at 172-73.

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 05a0476p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WACHOVIA BANK, N.A. and WACHOVIA MORTGAGE CORPORATION,

Plaintiffs-Appellees,

No. 04-2257

v.

LINDA A. WATTERS, Commissioner of the Michigan Office of Insurance and Financial Services,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Michigan at Lansing.
No. 03-00105—Robert Holmes Bell, Chief District Judge.

Argued: October 27, 2005

Decided and Filed: December 19, 2005

Before: MARTIN, GIBBONS, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: E. John Blanchard, MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, Lansing, Michigan, for Appellant. Lori McAllister, DYKEMA GOSSETT, Lansing, Michigan, for Appellees. **ON BRIEF**: John C. Scherbarth,

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL Lansing, Michigan, for Appellant. Lori McAllister, William Perrone, DYKEMA GOSSETT, Lansing, Michigan, for Appellees. Jessica Dvorak, JO WA ATTORNEY GENERA OFFICE, Des Moines, Iowa, Gregory L. McClelland, McCLELLAND & ANDERSON, Lansing, Michigan, Frederick C. Schafrick, GOODWIN PROCTER, Washingto D.C., Douglas B. Jordan, OFFICE OF THE COMPTROLLI OF THE CURRENCY, Washington, D.C., for Amici Curiae

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OPINION

BOYCE F. MARTIN, JR., Circuit Judge. The quest before us is whether the National Bank Act and regulations promulgated by the Office of the Comptroller of the Curren preempt Michigan banking laws concerning operating subsidiaries of nationally chartered banks.[1] The district cou held that the Michigan laws are preempted and granted summary judgment in favor of Wachovia. The State of

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[1] The specific Michigan laws at issue in this case are: (a) provisions requiring registration before a mortgage lender may conduct business in Michigan: MICH. COMP. LAWS § 445.1652(1), 445.1656(l)(d), 445.1 679(l)(a), 493.52(1), and 493 .53a(d); (b) provisions requiring the paym of fees on initial application for registration, or renewals thereafter: MI(COMP. LAWS § 445.1658, 445.1657(1), 493.54, and 493.56a(2); (c) provisions requiring that annual financial statements be submitted to the Commissioner and certain documents retained in a particular format: MICH. COMP. LAWS § 445.1657(2), 445.1671, 493.56a(2), and 493.56a(13); (d) provisions placing registrants under the "general supervision and control" of the Commissioner, with the power to condu examinations and investigations: MICH. COMP. LAWS §§ 445.1661,493.56b; (e) provisions permitting the Commissioner to investigate a complaint from any person if the appropriate federal regulatory authority is not pursuing it "adequately": MICH. COMP. LA § 445.1663; and (f) provisions allowing the Commissioner to take regulatory or other actions based on violations of the provisions set fort above: MICH. COMP. LAWS §§ 445.1665, 445.1666, 493.58-59, and 493.62a.

Michigan filed its notice of appeal on January 27, 2004. Since that time, the federal district court for the District of Maryland, and the United States Courts of Appeal for the Second and Ninth Circuits ruled on precisely the issue we address today. *See Wachovia Bank v. Burke*, 414 F.3d 305 (2d Cir. 2005); *Wells Fargo Bank v. Boutris*, 419 F.3d 949 (9th Cir. 2005); *National City Bank v. Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005). Each of those courts held that the National Bank Act and the regulations promulgated by the Comptroller preempt conflicting state laws. Because we agree with the outcome and reasoning of those courts's decisions, we hold that the National Bank Act and the regulations at issue preempt the conflicting Michigan law. We further hold that the regulations do not violate the Tenth Amendment to the United States Constitution. We therefore affirm the district court's grant of summary judgment in favor of Wachovia.

I.

The parties agree that no material facts are disputed. Michigan has enacted a series of banking laws that are enforced by the defendant, the Commissioner of the Michigan Office of Insurance and Financial Services. As explained by the district court, two Michigan statutes are at issue. See MICH. COMP. LAWS § 445.1651 *et seq*. MICH. COMP. LAWS § 493.51 *et seq*. Pursuant to these statutes, Wachovia Mortgage must register with the State, but is not required to obtain a license to operate. *See* MICH. COMP. LAWS § 445.1652, 493.52. Moreover, Michigan's regulatory scheme permits it to investigate a specific consumer complaint if the complaint is not otherwise being pursued by the Comptroller. See MICH. COMP. LAWS § 445.1663(2) ("[T]he commissioner…shall make no investigation of the complaint if the complaint is being adequately pursued by the appropriate federal regulatory authority."). Finally, the Michigan statutes also require Wachovia to provide a financial statement annually, to pay an annual operating fee, to maintain certain documents, and to retain those documents for examination by

the Commissioner. *See* MICH. COMP. LAW §§ 445.1657(2 493.56a(2), 445.1658(1), 493.54, 445.1671, 493.68.

Wachovia Bank is a national banking association chartered under the National Bank Act, 12 U.S.C. § 21 *et seq* Wachovia Mortgage originally registered in Michigan to mal first mortgage loans as it does in various states. On January 1 2003, Wachovia Mortgage became a wholly owned operatin subsidiary of Wachovia Bank. After July 1, 2003, Wachovia Mortgage also began making second mortgage loans in Michigan.

On April 3, 2003, Wachovia Mortgage advised the State of Michigan that it was surrendering its lending registration in Michigan. The Commissioner responded by advising Wachovia Mortgage that effective July 1, 2003, Wachovia Mortgage would no longer be authorized to condu mortgage lending activities within the State. Wachovia then filed suit seeking a declaration that the Michigan statutes at issue are preempted by the National Banking Act and the Comptroller's regulations.

II.

We review a district court's decision to grant summa judgment de novo. *Bennett v. Eastpointe*, 410 F.3d 810(6th Cir. 2005). Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law Fed. R. Civ. P. 56(c). The parties agree that no material fact are disputed and therefore only two legal issues are before th Court: (1) do the National Bank Act and the Comptroller's regulations preempt the Michigan laws' application to Wachovia and (2) do the Comptroller's regulations violate th Tenth Amendment to the United States Constitution? We answer yes to the first question and no to the second.

The National Bank Act was enacted in 1864 "to facilitate...a national banking system." *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 315 (1978) (internal quotation omitted). Relevant to our discussion, the National Bank Act establishes nationally chartered banks and vests these banks with certain powers, including "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). To prevent state regulation of the national banking system, the Act provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal Law...." 12 U.S.C. § 484(a).

The Office of the Comptroller of the Currency is the federal administrative agency with the "primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995). Congress has authorized the agency to promulgate rules and regulations, and the agency may use its authority to define the "incidental powers" of national banks beyond those specifically enumerated in the Civil War era statute. See *Id.* at 258 ("[T]he business of banking is not limited to the enumerated powers in § 24 Seventh... [and] the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated."); *see also* 12 U.S.C. § 93a. Drawing on its authority, the Comptroller has issued a regulation that, subject to certain exceptions, it has exclusive visitorial powers over national banks. 12 C.F.R. § 7.4000 (including the power to examine national banks, inspect their records, and regulate their activities authorized by federal law).

As Wachovia notes in its brief, additional regulations are relevant to this case. One such regulation is 12 C.F.R. § 5.34, providing that a "national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or

incidental to, the business of banking." 12 C.F.R. § 5.34(e)(*see also Wells Fargo Bank*, 419 F.3d at 960 (noting that "permitting operating subsidiaries does not expand the functions carried out by the banks"). Moreover, "[a]n operating subsidiary conducts activities authorized under thi section pursuant to the same authorization, terms, and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. § 5.34(e)(3). This reflects t Comptroller's view — held since the 1960s — that the pract of using an operating subsidiary to conduct the business of banking is an appropriate incidental power under 12 U.S.C. 24 (Seventh).

The federal regulation the State of Michigan argues most vehemently against was adopted in 2001 and promulga as 12 C.F.R. § 7.4006. It states that "[u]nless otherwise provided by Federal law or OCC regulation, State laws appl to national bank operating subsidiaries to the same extent th those laws apply to the parent national bank." 12 C.F.R. § 7.4006. Michigan argues that the Comptroller exceeded its congressionally delegated authority by promulgating section 7.4006 because the regulation impermissibly expands the definition of "national bank." The State further argues that a federal regulatory agency cannot preempt state laws unless Congress has expressly and clearly manifested an intent for to do so.

Michigan's argument regarding preemption is "misdirected." *Fid. Fed. Say. & Loan Ass'n v. De la Cuesta* 458 U.S. 141 (1982). The type of preemption at issue in this case is "conflict preemption," which can arise where "state l stands as an obstacle to the accomplishment and execution c the f purposes and objectives of Congress." *Id.* at 153 (inter questions and citations omitted).[1] Michigan does not disput the fact that its regulatory scheme stands as an obstacle to th

[1] "Federal regulations have no less pre-emptive effect than federal statu *De la Cuesta*, 458 U.S. at 153.

National Banking Act and the relevant regulations promulgated by the Comptroller. Thus, the only question is whether the Comptroller "has exceeded [its] statutory authority or acted arbitrarily." *Id.* at 154. Contrary to Michigan's arguments, a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Id.* at 154. Such a "narrow focus" is "misdirected." *Id.*[1]

We therefore decline Michigan's invitation to frame the issue as whether Congress has expressly and clearly manifested its intent to preempt state laws such as Michigan's and instead focus on whether the Comptroller has exceeded its authority or acted arbitrarily. We do so through the framework established by *Chevron US.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *see also NationsBank*, 513 U.S. at 257-58 (applying the *Chevron* doctrine to determine whether the Office of the Comptroller of the Currency was authorized to grant a national bank's application to sell annuities); *Boutris*, 419 F.3d at 958 (applying *Chevron* to answer exact question posed in this case); *Burke*, 414 F.3d at 315 (same). The district court appropriately conducted its analysis pursuant to *Chevron* and concluded that the regulations are within the Comptroller's authority and are a reasonable interpretation of the statute. We agree.

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[1] Michigan does correctly assert that there is a presumption against preemption in areas of regulation typically left to the states. "The presumption against federal preemption disappears, however, in fields of regulation that have been substantially occupied by federal authority for an extended period of time. Regulation of federally chartered banks is one such area." *Flagg v. Yonkers Say. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005). Likewise, as the Ninth Circuit has noted, "Congress has legislated in the field of banking from the days of *M'Culloch v. Maryland*, creating an extensive federal statutory and regulatory scheme. The history of national banking legislation has been one of interpreting grants of both enumerated and incidental powers to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting contrary state law." *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002) (internal quotation and citation omitted).

Under *Chevron*, we are confronted with two questior First, we ask "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842; *see al NationsBank*, 513 U.S. at 257 (asking "whether the intent of Congress is clear as to the precise question at issue"). If Congress's intent is clear, "that is the end of the matter. But the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's ansv is based on a permissible construction of the statute." *NationsBank*, 513 U.S. at 257 (internal quotation and citatio omitted). Any ambiguities require us to "give great weight any reasonable construction" of the statutes by the Comptroller. *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 40 (1987); see also *NationsBank*, 513 U.S. at 257; *De la Cuesta* 458 U.S. at 153-54.

We conclude that Congress has not spoken precisely the issue. Contrary to Michigan's arguments, the Comptroll regulations do not expand the definition of "national bank" Congress used it in section 484 to include an "operating subsidiary," such as Wachovia Mortgage. Rather, the regulations interpret a national bank's "incidental powers" under 12 U.S.C. § 24 (Seventh) to include the power to con business through an operating subsidiary. *See* 12 C.F.R. § 5 As the Comptroller explained in promulgating 12 C.F.R. § 7.4006, "operating subsidiaries have long been authorized f national banks and provide national banks with a convenien alternative to conduct activities that the bank could conduct directly." *See generally* Investment Securities; Bank Activi and Operations; Leasing, 66 Fed. Reg. 34,788 (July 2, 2001 (announcing final rule). Regulation section 7.4006 makes c that states cannot obstruct a national bank's power, granted it by Congress and federal regulations, to conduct "the busi of banking" through the use of operating subsidiaries, by imposing state laws and regulations on the subsidiaries that could not be imposed on the parent. *See Burke*, 414 F.3d at 316. Thus, "[t]o the extent that using an operating subsidia

a legitimate power granted to national banks, 12 U.S.C. § 484 provides the OCC with ample authority to preempt states from exercising visitorial powers over the subsidiary because such state regulation could interfere with the national bank's exercise of its federal powers." *Id.* (citation omitted).

Furthermore, as noted above the National Bank Act was enacted in 1864. Operating subsidiaries were not recognized as a legitimate tool for carrying on the business of banking until the 1960s. *See* 69 Fed. Reg. 1895; Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,441, 11,459 (Aug. 31, 1966). "Overall, the history of the banking laws indicates that operating subsidiaries have been treated distinctly by Congress and the OCC, and no statute speaks directly to the scope of federal versus state power over them." *Burke*, 414 F.3 d at 318. The Comptroller has the authority to define a national bank's "incidental powers" to include conducting the business of banking — in this case the making of first and second mortgage loans — through an operating subsidiary. Thus, Wachovia Bank itself can make first and second mortgage loans and it can also do so through an operating subsidiary such as Wachovia Mortgage. See 12 C.F.R. § 5.34. "Having so defined a national bank's power to conduct business through an operating subsidiary, the OCC further has the authority to preempt state law concerning operating subsidiaries to the same extent that those laws would be preempted with respect to the parent national bank." *Burke*, 414 F.3d at 318 (citing 12 C.F.R. §§ 7.4006, 34.1, 34.4); *see also* 12 U.S.C. § 93a.

Michigan and *amici* further argue that by including references to "affiliates" in other sections of the statute, but failing to do so in section 484, Congress unambiguously intended to exclude such entities from the visitation exception. Both courts to address this argument have denied it, *Boutris*, 419 F.3d at 959 n.12; *Burke*, 414 F.3d at 317-18, and we as well. Even assuming that the terms "operating subsidiary" and

"affiliate" are synonymous,[1] the argument fails. The absenc of any reference to operating subsidiaries does not convey th unambiguous intent of Congress. See *Boutris*, 419 F.3d at 95 n. 12. The statutes cited that include the term "affiliate" — section 161(c), section 371 c, section 371 c-i, and section 48 — establish the duties of a national bank to report on the activities of its affiliates and the bank's relationship with its affiliates. In order to be comprehensible, the statutes must mention "affiliates." This does not mean, however, that any statute that does not mention "affiliates" reflects the unambiguous intent of Congress to exclude them from the provision. If anything, it indicates that Congress has only included reference to affiliates in the limited cases where the must be distinguished from national banks. Michigan and a have pointed to no statutory sections that do not specifically pertain to the relationship between national banks and their affiliates that contain the term "affiliates" or "operating subsidiaries."

Thus, the only remaining determination pursuant to t *Chevron* analysis is whether the regulations are a reasonable construction of the statutory scheme. If the Comptroller's interpretation is reasonable, we must defer to its construction the statute. *See NationsBank*, 513 U.S. at 257. We reject Michigan's arguments and conclude that the Comptroller's regulations are a reasonable construction of the National Ba Act.

First, we do not find persuasive Michigan's argumen that the regulations disregard the principle of corporate separateness. Rather, the regulations merely recognize that decades national banks have been conducting the business o

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[1] The Second Circuit addressed this argument in great detail and found evidence that "operating subsidiaries" and "affiliates" are not co-termin *Burke*, 414 S.3d at 316-17. The opinion proceeded, however, to analyz two as if they were synonymous and concluded that there was no unambiguous intent. *Id.* at 317-18.

banking through operating subsidiaries. *See* 66 Fed. Reg. at 34,788 (" decades national banks have been authorized to use the operating subsidiary as a convenient and useful corporate form for conducting activities that the parent bank could conduct directly."). The regulations, specifically section 7.4006, simply reflect the eminently reasonable conclusion that when a bank chooses to utilize the authority it is granted under federal law, it ought not be hindered by conflicting state regulations. *See also Burke*, 414 F.3d at 319 ("Section 7.4006 reflects the OCC's policy judgment that national banks' use of operating subsidiaries as separately structured corporate entities is desirable and that it should not be hindered by state regulations."). This rationale was recognized as early as 1966 when the Comptroller explained: "The use of controlled subsidiary corporations provides national banks with additional options in structuring their businesses. National banks may desire to exercise such option for many reasons, including controlling operating costs, improving effectiveness of supervision...or separating particular operations of the bank from other operations." Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,441, 11,460 (Aug. 31, 1966); see also Rules, Policies and Procedures for Corporate Activities, 61 Fed. Reg. 60,342 (Nov. 27, 1996); Financial Subsidiaries and Operating Subsidiaries, 65 Fed. Reg. 12,905, 12,908-09 (Mar. 10, 2000); *see also Boutris*, 419 F.3d at 960 (noting that "[t]he determination whether to conduct business through operating subsidiaries or, instead, through subdivisions of the bank itself is thus essentially one of internal organization, so long as the operating subsidiary form or organization cannot be used to evade the rules that apply to national banks."). *Chevron* requires us to defer to this reasonable interpretation.

We find no merit in the remainder of Michigan's arguments and hold that the Comptroller's regulations preempt conflicting Michigan laws. "[T]he OCC regulations reflect a consistent and well-reasoned approach to preempting state regulation of operating subsidiaries so as to avoid interference

with national banks' exercise of their powers under 12 U.S.C 24 (Seventh) and their ability to use operating subsidiaries in the dynamic market of banking and real estate lending." *Bur* 414 F.3d at 321.

One final note regarding preemption: Michigan argu that should we affirm the district court's finding of preempti "Michigan would be precluded from protecting its citizens from any inappropriate actions taken by state incorporated nonbank subsidiaries of national banks that operate in the mortgage industry." Appellant's Br. at viii. As the Supreme Court has stated, courts "cannot resolve conflicts of authorit by our judgment as to the wisdom or need of either conflicti policy. The compact between the states creating the Federal Government resolves them as a matter of supremacy. Howe wise or needful [a state's policy],...it must give way to the contrary federal policy." *Franklin National Bank v. New Yor* 347 U.S. 373 (1954). Michigan's recourse (and the recourse for the other thirty attorney generals as amicus curiae) is wit Congress.

III.

Michigan also argues that 12 C.F.R. § 7.4006 violate the Tenth Amendment to the United States Constitution. We agree with the district court that Congress assumed the authority to regulate national banks under the Commerce Clause. The Tenth Amendment, reserving to the states those rights and powers not enumerated, is therefore, not implicat by the National Bank Act or lawfully promulgated regulatio thereunder.

IV.

For the previously stated reasons, we affirm the distr court's judgment granting summary judgment to Wachovia.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-2257

FILED
DEC 19 2005
LEONARD GREEN, Clerk

WACHOVIA BANK, N.A. and
WACHOVIA MORTGAGE CORPORATION,
Plaintiffs - Appellees,

v.

LINDA A. WATTERS, Commissioner of the Michigan Office of Insurance and Financial Services,
Defendant - Appellant.

Before: MARTIN, GIBBONS, and GRIFFIN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Lansing.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court granting summary judgment to appellees Wachovia Bank and Wachovia Mortgage is AFFIRMED.

ENTERED BY ORDER OF THE COURT
/s/
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WACHOVIA BANK, N.A. and
WACHOVIA MORTGAGE CORPORATION,

Plaintiffs,

File No. 5:03-CV-105

v.

HON. ROBERT
HOLMES BELL

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Insurance and Financial Services,

Defendant.

OPINION

Plaintiffs Wachovia Bank, N.A. ("Wachovia Bank") and Wachovia Mortgage Company ("Wachovia Mortgage") (collectively "Wachovia") seek declaratory and injunctive relief to prohibit the Commissioner of the Michigan Office Insurance and Financial Services ("Commissioner") from attempting to interfere with the alleged exclusive visitorial rights of the Office of the Comptroller of the Currency ("OCC"). Plaintiffs contend that the state law restrictions at issue are preempted by the National Bank Act and by 0CC regulations promulgated pursuant to its authority under the Plaintiffs also contend that the State of Michigan's attempt regulate Wachovia Mortgage violates 42 U.S.C. § 1983. Plaintiffs' have moved for summary judgment.[1]

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[1] Briefs amici curiae have been filed by the OCC; the American Banke Association, America's Community Bankers, Consumer Mortgage

I.

Wachovia Bank is a national banking association chartered under the National Bank Act, 12 U.S.C. § 21 *et seq.* (Complaint ¶4). Wachovia Mortgage, previously named First Union Mortgage Corporation, originally registered to engage in the business of making first mortgage loans in Michigan under the Mortgage Brokers, Lenders and Servicers Licensing Act, Mich. Comp. Laws § 445.1656 *et seq.* On January 1, 2003, Wachovia Mortgage became a wholly owned operating subsidiary of Wachovia Bank. Wachovia Mortgage is engaged in making first mortgaging loans in various states including Michigan. After July 1, 2003, Wachovia Mortgage also began to engage in the business of making secondary mortgage loans in Michigan.

On April 3, 2002, Wachovia Mortgage advised the State of Michigan that it was surrendering its lending registration for Michigan. The Commissioner responded with a letter advising Wachovia Mortgage that effective July 1, 2003, Wachovia Mortgage would no longer be authorized to conduct mortgage lending activities in Michigan. The Commissioner has not yet sought a cease and desist order in conjunction with its position that Wachovia Mortgage must register with the State of Michigan to engage in mortgage lending.

II.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In evaluating a motion for

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Coalition, Consumer Bankers Association, Electronic Financial Services Counsel, the Financial Services Roundtable, and Michigan Bankers Association ("American Bankers Association"); and the Attorney Generals of Forty States and District of Columbia ("State Attorneys General").

summary judgment the Court must look beyond the pleadin and assess the proof to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If Defendants carry their burden of showing there is an absence of evidence to suppo claim then Plaintiff must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on f that there is a genuine issue of material fact for trial. *Celote Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986).

"On summary judgment, all reasonable inferences drawn from the evidence must be viewed in the light most favorable to the parties opposing the motion." *Hanover Ins. Co. v. American Engineering Co.*, 33 F.3d 727, 730 (6thCir. 1994) (citing *Matsushita*, 475 U.S. at 5 86-88). Nevertheles the mere existence of a scintilla of evidence in support of Plaintiffs position is not sufficient to create a genuine issue material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 252 (1986). The proper inquiry is whether the evidence is su that a reasonable jury could return a verdict for Plaintiff. *Id See generally, Street v. J. C. Bradford & Co.*, 886 F.2d 147 1476-80 (6th Cir. 1989).

III.

The issue before this Court is whether the State of Michigan through its Office of Insurance and Financial Services may exercise visitorial powers over state-chartered operating subsidiaries of national banks. Visitation, in law, the act of a superior or superintending officer, who visits a corporation to examine into the corporation's manner of conducting its business and to enforce laws and regulations. *First Union Nat'l Bank v. Burke*, 48 F. Supp.2d 132, 144 (D.Conn. 1999). In the context of national banking, visitori powers generally refer to the power to visit a national bank examine its activities and its observance of applicable laws, and encompass any examination of a national bank's record relative to the conduct of its banking business as well as an

enforcement action that may be undertaken for violations of law. *National City Bank of Indiana v. Boutris*, 2003 WL 21536818 (E.D. Cal. 2003). Generally, national banks are free from any state visitorial powers. *See* 12 U.S.C. § 484(a).

A. Michigan's Regulatory Scheme

The State of Michigan regulates the mortgage industry through two acts, the Mortgage Brokers, Lenders, & Servicers Licensing Act, MICH. COMP. LAW § 445.1651 *et seq.*, and the Secondary Mortgage Loan Act, MICH. COMP. LAW § 493.51 *et seq.* Under these statutes, Wachovia Mortgage is required to register with the State of Michigan, but is not required to obtain a license to operate in the state. *See* MICH. COMP. LAW § 445.1652, 493.52. Under Michigan's regulatory scheme, the state reserves the option to investigate a specific consumer complaint if the complaint is not otherwise being pursued by the OCC. *See* MICH. COMP. LAW § 445.1663(2) ("the commissioner...shall make no investigation of the complaint if the complaint is being adequately pursued by the appropriate federal regulatory authority."). The Michigan statutes also require a registrant to provide a financial statement annually, to pay an annual operating fee, to maintain certain documents, and to retain those documents for examination by the Commissioner. *See* MICH. COMP. LAW § 445.1657(2), 493.56a(2), 445.1658(1), 493.54, 445.1671,493.68.

B. The National Regulatory Scheme

National banks are federally chartered institutions created and governed by the National Bank Act ("the Act"), 12 U.S.C. § 21 *et seq.* Under the Act, national banks have the authority to receive deposits, loan money and exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 Seventh. Further, national banks are authorized to make, arrange and deal in loans secured by interests in real estate. 12 U.S.C. § 371. Under the Act, national

banks are generally free from state visitorial powers. Sectior 84(a) provides that:

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised by Congress or by either House thereof or by any committee of Congress or of either House duly authorized. 12 U.S.C. § 484(a).

The National Bank Act is also the OCC's enabling statute, providing the OCC with broad supervision and enforcement power over national banks authorized under the Act. *See NationsBank of North Carolina v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995). Pursuant to this authority, th OCC has promulgated additional regulations pertaining to national bank operating subsidiaries. OCC regulations provic that a national bank may conduct through an operating subsidiary activities that are permissible for a national bank. C.F.R. § 5.34(e)(l). In addition, the regulations provides tha an operating subsidiary is subject to the OCC's visitorial authority to the same extent as a national bank. 12 C.F.R. § 5.34(e)(3). OCC regulations also provide that "[s]tate laws apply to national bank operating subsidiaries to the same ext that those laws apply to the parent national bank." 12 C.F.R. 7.4006. Because § 484 prevents state visitorial authority to l exercised over national banks, the regulations extend this prohibition to national bank operating subsidiaries.

C. The Chevron Analysis

The Commissioner argues that the OCC exceeded its authority by promulgating 12 C.F.R. § 7.4006, the regulatior limiting the application of state laws to national bank operati subsidiaries to the same extent as they apply to national banl The Commissioner contends that this regulation impermissil expands the definition of "national bank" contrary to 12 U.S

§ 221 and 221a. Thus, this Court must apply the *Chevron* test to review the agency's construction of the statute. *See Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837 (1984).

Under the *Chevron* test, a court, reviewing an agency's construction of a statute which it administers, is confronted with two questions. *Id.* First, the court must determine whether Congress has directly spoken on the precise question at issue. *Id.* If Congress' intent is clear, then the court as well as the agency must give effect to the unambiguous intent of Congress. *Id.*

If, however, the statute is silent or ambiguous with respect to the specific issue, the court must determine whether the agency's interpretation is based on a permissible construction of the statute. The fact that the regulation reviewed carries preemptive force does not alter this analysis. The reasonableness of the regulations does not depend on express congressional authorization to displace state law. See *Fidelity Fed. Say. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982). Because Wachovia and the Commissioner concede that Congress has not spoken on the instant question, this Court proceeds to determine whether the agency's interpretation is based on a permissible construction of the statute.

The Commissioner contends that the regulation impermissibly expands the definition of "national bank" to include state-chartered operating subsidiaries. Sections 221 and 221 a set out definitions for the Federal Reserve System. Under Section 221a, an "affiliate" includes any non-bank corporation controlled or owned by a national bank. In conjunction, Section 481 provides for the examination of any national bank and its affiliates. 12 U.S.C. § 481. In contrast, Section 484 provides the 0CC with exclusive visitorial powers over national banks. The Commissioner contends § 484's

silence as to affiliates prevents the section from being applie to state-chartered operating subsidiaries.

The National Bank Act was enacted in the Civil War era. Clearly, at that time, operating subsidiaries were not contemplated as tools of national banks to carry out the business of banking. Only many decades later, in the 1960's operating subsidiaries were acknowledged as a legitimate m for national banks to conduct banking. 69 F.R. 1895. Sectio 484's silence does not compel a specific result, it merely requires the application of the second step of the *Chevron* analysis. In addition, Section 484 is not the sole determinant the agency's authority over Wachovia Mortgage. Section 24 Seventh which provides national banks powers incidental to business of banking provides additional authority for the OC regulations.

State Attorneys General, on behalf of the Commissioner, also argue that the OCC regulation at issue exceeds the agency's authority under 12 U.S.C. §§ 371(a) a 93a. Section 371(a) permits the OCC to issue rules imposin additional restrictions and requirements on real estate loans. State Attorneys General contends that 12 §1828(o), which provides a criteria for uniform real estate lending standards, limits § 371(a)'s ability to impose restrictions that preempt state law. Under OCC regulation, one of the uniform lendi standards requires national bank to adopt policies in compliance with all real estate related laws and regulations. C.F.R. Part 34, Subpart D. App. A. On the basis of this regulation, State Attorneys General contend that Congress' subsequent passage of the Riegle Neal Act was premised or belief that states had the authority to regulate real estate loa made by national banks. Section 1828(o), however, does n require compliance with state laws. Arguably, the regulatio promulgated by the OCC allows for such compliance.

Lastly, State Attorneys General argue that the OCC does not possess any independent power to preempt state laws under 12 U.S.C. § 93a. Section 93a provides:

> Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office except that the authority conferred by this section does not apply to section 36 of this title [the McFadden Act, which makes the power of national banks to branch subject to state law] or to securities activities of National Bank under the Act commonly known as the "Glass-Steagall Act."

12 U.S.C. § 93a. They contend that the OCC has no authority to promulgate 12 C.F.R. § 7.4006 because the statute does not expressly grant the OCC the power to promulgate regulations that preempt state law. State Attorneys General contend that under § 93a, the OCC cannot grant powers to national banks that they do not already possess under federal statutory law. Section 93a contains a broad grant of authority to promulgate regulations, including those that preempt state laws. *See Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 885 (D.C. Cir. 1983) ("the entire legislative scheme is one that contemplates the operation of state law only in the absence of federal law and where such state law does not conflict with the policies of the National Banking Act."). More importantly, an express Congressional authorization to displace state law is not required. *See Fidelity Fed. Sav. & Loan*, 458 U.S. at 154.

The OCC holds broad and pervasive authority to regulate national banking associations. Under 12 U.S.C. § 1818, the OCC has the authority to conduct surveillance of national banks' compliance with any "law, rule, or regulation,

or any condition imposed in writing by the agency," and to prevent any "unsafe or unsound practice" on the part of the bank. Under § 484, OCC maintains exclusive visitorial authority over national banks. Lastly, the OCC's authority extends to the regulation of national banks' powers that are incidental to the business of banking. *See* 12 U.S.C. § 24 Seventh. In light of this statutory authority, it was within the OCC's authority to promulgate 7.4006.

B. Preemption

The Commissioner also contends the federal regulati should not preempt Michigan law because they do not confl The Commissioner argues that many of her visitorial power: cannot be exercised against a registrant under Michigan law In addition, the Commissioner argues that a specific consur complaint is pursued only if it is not otherwise being pursue by the OCC. MICH COMP. LAWS § 1663(2).

A state cannot regulate a national bank where doing would prevent or significantly interfere with the national bank's exercise of its powers. *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33-34 (1996). Even where Congress has not completely displaced state regulatic in a specific area, state law is nullified to the extent that it actually conflicts with federal law. *See Fidelity Fed. Say. & Loan*, 458 U.S. at 153. Such a conflict arises when state lav stands as an obstacle to the accomplishment and execution (the full purposes and objectives of Congress. *Id.* The relati importance to the State of its own law is not material when there is a conflict with a valid federal law. *Id.* Federal regulations have no less preemptive effect than federal statu *Id.*

The Commissioner understates the impact of the Michigan statutes. Under the Michigan statutes, Wachovia Mortgage must register, pay annual fees, file a financial

statement annually, and submit to the Commissioner's general supervision and control. These requirements clearly interfere with its national bank powers to conduct the business of banking. *See* 12 U.S.C. 24 Seventh. Even the most limited aspects of state licensing requirements have been preempted because they created impermissible conditions upon the authority of a national bank to do business. *See Association of Banks in Insurance, Inc. v. Duryee*, 55 F. Supp.2d 799, 812 (S.D. Ohio 1999), aff'd 270 F.3d 397 (6th Cir. 2001).

Preemption depends on the reasonableness of the OCC's interpretation of the statute, not on the merits of the state law policy underlying its regulatory scheme. Although Commissioner and State Attorneys General have raised legal challenges to the OCC regulation, the essence of their arguments have relied on the policy considerations which weigh in favor of state authority to regulate companies who conduct mortgage operations within its borders. A challenge based on the wisdom of an agency or the competing policy of the states must fail. See *Chevron* at 866. It is not for this Court to weigh the relative merits of Michigan's state laws designed to protect mortgage consumers. *See Franklin Nat'! Bank v. New York*, 347 U.S. 373 (1954). Although the State of Michigan maintains an interest in protecting its citizens, those compelling policy reasons do not undermine the reasonableness of the OCC' s regulation.

C. The Tenth Amendment

The Commissioner argues that 12 C.F.R. § 7.4006 violates the Tenth Amendment because it essentially federalizes a state corporation by converting it into an instrumentality of federal law. In *Hopkins Federal Savings & Loan Ass'n v. Cleary*, 296 U.S. 315 (1935), the Supreme Court held that a federal law violated the Tenth Amendment to the extent that it permitted the conversion of state associations into federal ones in contravention of the laws of their place of creation. In *Hopkins*, a federal law permitted a state savings

and loan to convert into a federal entity with the approval of simple majority of shareholders. *Id.* T[illegible] law was in contravention of state corporate law, which had different requirements for winding up a state corporation. *Id.*

Unlike Hopkins, Congress assumed authority to regulate national banks under the Commerce Clause. The Tenth Amendment reserves to the states those rights not enumerated. *See* U.S. CONST. AMEND X. Because the Congress was at liberty to exercise this power under the Commerce Clause, the Tenth Amendment is not implicated.

D. 42 U.S.C. § 1983

Wachovia requests damages under 42 § 1983. In orc to prevail under § 1983, the claim must meet three criteria, (that Congress intended the provision in question to benefit t plaintiff; (2) that the right protected by the statute is not so vague or amorphous that its enforcement would strain judici competence; and (3) that the statute unambiguously impose: binding obligation on the States. *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997). Wachovia argues that 12 U.S.C. § Seventh statute expressly grants a power, that the power is r so amorphous, and that the power is granted in mandatory a affirmative terms.

Wachovia's right based upon incidental powers is nc right cognizable under § 1983. Under § 1983, the violation must redress a violation of a federal right, not merely a violation of federal law. *Blessing* at 340. The incidental powers of § 24 Seventh do not establish an unambiguously conferred right to be free from state visitorial authority. It i: 484 which extends the OCC' s exclusive visitorial authority national bank operating subsidiaries. This section, however extends authority to the OCC, it does not grant a right to a national bank. The OCC regulatory scheme was "intended primarily for the benefit of the public and the commonwealt

ıot for the benefit of banks and bank directors." *See In re Franklin Nat. Bank Securities Litigation*, 445 F. Supp. 723, 731 (D.C.N.Y. 1978) (reviewing the effect of visitation under § 1981). Thus, Wachovia's § 1983 claim must fail.

IV.

For the previously stated reasons, Wachovia's motion for summary judgment will be granted in part and denied in part and an order will be issued in accordance with this opinion.

Date: August 30, 2004

/s/
ROBERT HOLMES BELL
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WACHOVIA BANK, N.A. and
WACHOVIA MORTGAGE CORPORATION,

Plaintiffs,

File No. 5:03-CV-105

v.

HON. ROBERT
HOLMES BELL

LINDA A. WATTERS, in her official
capacity as Commissioner of the Michigan Office of Insurar
and Financial Services,

Defendant.

JUDGMENT

In accordance with the opinion and order entered August 30, 2004,

IT IS HEREBY ORDERED that **JUDGMENT** is entered in favor of plaintiffs Wachovia Bank, N.A. and Wachovia Mortgage Corporation.

Date: August 31, 2004 /s/ Robert Holmes Bell

ROBERT HOLMES BELL
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WACHOVIA BANK, N.A. and
WACHOVIA MORTGAGE CORPORATION,

Plaintiffs,

File No. 5:03-CV-105

v.

HON. ROBERT
HOLMES BELL

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Insurance and Financial Services,

Defendant.

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiff's motion for summary judgment (Docket # 15) is **GRANTED** in part and **DENIED** in part.

Plaintiff's claim for declaratory and injunctive relief is **GRANTED** and Plaintiff's claim under 42 U.S.C. § 1983 is **DENIED**.

Date: August 30, 2004 /s/ Robert Holmes Bell

ROBERT HOLMES BELL
CHIEF UNITED STATES
DISTRICT JUDGE

Case No: 04-2257

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

FILED
JAN 18 2006
LEONARD GREEN, Clerk

WACHOVIA BANK, N.A.; WACHOVIA MORTGAGE C(

Plaintiffs – Appellees

v.

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Insurance and Financial Services

Defendant – Appellant

STATE OF IOWA; COMPTROLLER OF THE CURRENC
AMERICAN COMMUNITY
OF BANKERS; CONSUMER MORTGAGE COALITION;
FINANCIAL SERVICES
ROUNDTABLE; MICHIGAN ASSOCIATION OF
REALTORS; NATIONAL ASSOCIATION
OF REALTORS

Amici Curiae

BEFORE: MARTIN, GIBBONS, and GRIFFIN, Circuit Judges.

Upon consideration of the petition for rehearing filed the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

FILED
MAY 19 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1342

In the Supreme Court of the United States

LINDA A. WATTERS, Commissioner, Michigan Office of Insurance and Financial Services,

Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the Sixth Circuit correctly held that the Office of the Comptroller of the Currency ("OCC") acted within the bounds of its delegated authority when it determined that the incidental powers of a national bank include the power to carry out the business of banking through operating subsidiaries that are subject to the same terms and conditions, including the exclusive licensing and visitorial authority of the OCC, as the banks themselves?

CORPORATE DISCLOSURE STATEMENT

Wachovia Bank N.A. and Wachovia Mortgage Corporation state as follows: (1) Wachovia Bank, N.A. is owned by Wachovia Corporation, a financial services holding company publicly traded on the New York Stock Exchange; and (2) Wachovia Mortgage Corporation is owned by Wachovia Bank, N.A.

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PETITION FOR A WRIT OF CERTIORARI

Respondents, Wachovia Bank, N.A. ("Wachovia Bank") and Wachovia Mortgage Corporation ("Wachovia Mortgage"), respectfully request that this Court deny the petition for a writ of certiorari. In this case, the Sixth Circuit – in accord with every other court to address the issue – held that state attempts to regulate the operating subsidiaries of national banks are preempted by the National Bank Act and OCC regulations. It is not necessary for this Court to review that decision. There is no conflict in the circuits on the questions presented here. The decision does not impair any rights left to the States by the Tenth Amendment. The holding below, which affirmed the reasonableness of a well-considered agency regulation, plainly is correct. The petition for a writ for certiorari accordingly should be denied.

COUNTER-STATEMENT OF THE CASE

This case concerns the powers of national banks and the authority of their federal regulator, the OCC. Respondents challenged portions of Michigan's real estate lending statutes that regulate Respondents' conduct in three basic areas: (1) conditions for doing business in the State of Michigan, such as registration fees and filing requirements,[1] (2) examination

[1] The specific statutory provisions at issue are part of Michigan's Mortgage Brokers, Lenders, and Servicers Licensing Act, Mich. Comp. Laws § 445.1651 *et seq.*, and the Secondary Mortgage Act, Mich. Comp. Laws § 493.51 *et seq.* Wachovia challenged the provisions that (a) require registration before a mortgage lender may conduct business in Michigan, Mich. Comp. Laws §§ 445.1652(1), 445.1656(1)(d), 445.1679(1)(a), 493.52(1) and 493.53a(d); (b) require payment of fees on initial application for registration or renewals thereafter, Mich. Comp. Laws §§ 445.1658, 445.1657(1), 493.54, and 494.56a(2); (c) require annual financial statements be submitted to the Commissioner and certain documents retained in a particular format, Mich. Comp. Laws §§

and investigations by the state officials, and (3) regulatory actions to enforce these state law requirements. These Michigan statutes directly interfere with Wachovia Bank's ability to conduct banking business through its operating subsidiary, Wachovia Mortgage, and conflict with regulations that the OCC adopted under the National Bank Act ("NBA"). Contrary to Petitioner's assertions, Respondents have never argued for preemption of all state laws affecting national banks, only those that stand as an obstacle to the powers of national banks to conduct the business of banking through operating subsidiaries.

The NBA establishes nationally chartered banks, to which it grants, among other things, "all such incidental powers" that are necessary to conduct the business of banking. 12 U.S.C. § 24 (Seventh). The NBA further provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." 12 U.S.C. § 484(a). Since 1966, the OCC has recognized that national banks have the incidental power to conduct the business of banking through operating subsidiaries. 31 Fed. Reg. 11,459, 11,459-60 (Aug. 31, 1966).

The OCC has "primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh" and has the power to promulgate regulations that define "incidental powers" of national banks. *NationsBank of N.C., N.A. v.*

445.1657(2), 445.1671, 493.56a(2) and 493.56a(13); (d) place registrants under the "general supervision and control" of the Commissioner with the power to conduct examinations and investigations, Mich. Comp. Laws §§ 445.1661, 493.56b; (e) permit the Commissioner to investigate a complaint from any person if the appropriate federal regulatory authority is not pursuing it "adequately," Mich. Comp. Laws § 445.1663; and (f) allow the Commissioner to take regulatory or other actions based on violations of the foregoing provisions, Mich. Comp. Laws §§ 445.1665, 445.1666, 445.1667, 493.58-59, and 493.62a.

Variable Annuity Life Ins. Co., 513 U.S. 251, 256 (1995); 12 U.S.C. § 93a. Pursuant to this authority, the OCC has promulgated regulations providing that:

- the OCC has exclusive visitorial authority over national banks (12 C.F.R. § 7.4000);[2]

- a national bank "may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking" (12 C.F.R. § 5.34(e)(1));

- an operating subsidiary may conduct "activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank" (12 C.F.R. § 5.34(e)(3));

- the standards for real estate lending, as authorized by 12 U.S.C. § 371(a), apply to loans provided by "national banks and their operating subsidiaries" (12 C.F.R. § 34.1);

- a national bank may make real estate loans without regard to specified types of State laws that "obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers" (12 C.F.R. § 34.4); and

- "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank" (12 C.F.R. § 7.4006).

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[2] Visitorial authority" refers to the power to examine a bank, inspect its books and records, regulate and supervise its activities authorized by federal banking law, and enforce compliance with applicable state and federal laws concerning those activities. 12 C.F.R. § 7.4000(a)(2)(i)-(iv).

When the OCC recently revised some of its regulations, it explained that increasing state banking regulations had hindered "national banks' ability to conduct operations to the full extent authorized by Federal law." Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004). The OCC further explained that its responsibility for the "safe and sound operations" of national banks was central to its promulgation of these regulations. *Id.* at 1907.

In the face of this federal framework, the Petitioner, the Commissioner of the Office of Financial and Insurance Services for the State of Michigan, sought to use Michigan's banking statutes to regulate mortgage lenders operating in the state. Respondents challenged Petitioner's exercise, as against operating subsidiaries of national banks, of the regulatory authority purportedly granted in the Michigan statutes, which conflict with the federal regulatory framework described above. Affirming the district court's grant of summary judgment, the Sixth Circuit properly held that the OCC regulations, including section 7.4006, "reflect a consistent and well-reasoned approach to preempting state regulation of operating subsidiaries so as to avoid interference with national banks' exercise of their powers under 12 U.S.C. § 24 (Seventh) and their ability to use operating subsidiaries in the dynamic market of banking and real estate lending." *Watters v. Wachovia Bank N.A.*, 431 F.3d 556, 563 (6th Cir. 2005) (Pet. App. 11a-12a), citing *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 321 (2d Cir. 2005).

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner asks this Court to resolve a supposed conflict among the circuits and with this Court's prior decisions, and to address an alleged intrusion on state sovereignty in violation of the Tenth Amendment of the United States Constitution. The Petition should be denied for three primary

reasons. First, there is no conflict among the circuits, or with any prior decisions of this Court, arising from the issues presented. Every court that has considered the question has held that the OCC acted within the bounds of its delegated authority when it determined that the incidental powers of a national bank include the power to carry out the business of banking through operating subsidiaries that are subject to the same terms and conditions, including the exclusive licensing and visitorial authority of the OCC, as the banks themselves. Second, for the reasons set forth in the opinions of the Sixth, Second, and Ninth Circuits, and of the district courts to have considered the issue actually presented here, the decision below is correct. Third, there is no intrusion upon any state right preserved by the Tenth Amendment when Congress exercises its authority granted by the Commerce Clause.

A petition is presently pending in *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), No. 05-431, which presents a preemption issue substantially identical to the one presented in this case. In *Burke*, the Court invited the Solicitor General to submit the views of the United States. The Solicitor General filed his brief on May 11, 2006.[3] In that brief, the Solicitor General recommended that the petition be denied because there is no conflict among the circuits and the Second Circuit was correct in holding that the OCC's regulations have preemptive effect. Precisely the same conclusion applies here.

A. The Sixth Circuit Decision Is Consistent With Those Of The Second And Ninth Circuits, And The District Courts That Have Considered The Issue, And The Purported "Conflicts" Identified By Petitioners Do Not Exist.

All courts that have considered the question presented in this case—whether the NBA and OCC regulations preempt

[3] Referred to herein as "Solicitor General's Brief."

state banking laws concerning operating subsidiaries of nationally chartered banks—have decided the issue in the same way the Sixth Circuit did below.

In *Burke*, the Second Circuit held that Congress has not addressed the precise issue in this case, and that the OCC reasonably construed the NBA consistent with its statutory powers. *Burke*, 414 F.3d at 318-321. As a result, the Court concluded that Connecticut banking statutes are preempted by the OCC's rules that generally preempt state regulation of operating subsidiaries.

In the other circuit court decision on this issue, the Ninth Circuit held, in *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 954 (9th Cir. 2005), that the NBA preempts "the California Commissioner of Corporations' ... exercise of investigative and licensing authority over 'operating subsidiaries' of national banks." The court determined that the OCC had authority not only to allow national banks to create operating subsidiaries that perform national bank functions, but also to regulate operating subsidiaries of national banks. The Ninth Circuit held that the OCC's regulations permissibly reserved visitorial power over operating subsidiaries of national banks to the OCC. 419 F.3d at 964.

The *Burke* and *Boutris* opinions were guided by the *Chevron*[4] framework. None of the courts found the plain language of the NBA dispositive. Each therefore held that the OCC's interpretations of the NBA were entitled to deference because of the close relationship between the OCC's substantive policy determinations and its preemption regulation. In other words, "§ 7.4006 is 'a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.'" *Boutris*, 419 F.3d at 963 (citations omitted). *See also Burke*, 414 F.3d at 321 (regulations "reflect a con-

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[4] *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 328 (1984).

sistent and well-reasoned approach to preempting state regulation ...").

Similarly, the three district courts to have decided the issue presented in this case concluded that the OCC regulations preempt state laws that seek to regulate operating subsidiaries of national banks.[5] *See Office of the Comptroller of the Currency v. Spitzer*, 396 F. Supp.2d 383 (S.D.N.Y. 2005), appeal pending (granting declaratory and injunctive relief to OCC to preclude the New York Attorney General from enforcing certain state banking laws against national banks or their operating subsidiaries, on the ground that the state laws conflict with and are preempted by NBA and OCC's reasonable regulations); *Nat'l City Bank v. Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005), appeal pending (holding that Maryland banking laws purporting to authorize state banking commissioner to exercise licensing and visitorial authority over operating subsidiaries of national banks are preempted by NBA and OCC's regulations); *Wells Fargo Bank, N.A. v. Boutris*, 265 F. Supp. 2d 1162 (E.D. Cal. 2003), *aff'd in part*, 419 F.3d 949 (9th Cir. 2005). No court has decided the issues addressed by the Sixth Circuit below in a contrary manner.

Petitioner attempts to manufacture a "conflict" between the Sixth Circuit's decision and that of the Tenth Circuit in *Colorado Public Utilities Commission v. Harmon*, 951 F.2d 1571, 1578-79 (10th Cir. 1991).[6] In *Harmon*, the court faced

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[5] In addition to these cases, the district courts deciding the *Watters*, *Burke*, and *Boutris* cases all decided in favor of the OCC's authority over the operating subsidiaries of national banks, and were affirmed by the Sixth, Second and Ninth Circuits.

[6] This argument was not made below. This Court does not permit parties to raise new arguments in their petitions for certiorari, and Petitioner's attempt to do just that should be rejected. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 54-56 (2002); *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990).

a regulation that codified the judicially created test for preemption. The court held that, although the substance of the Secretary of Transportation's opinion regarding the subject matter of its regulations was entitled to deference, the court must make its own legal determination of preemption.

The *Harmon* decision flows from this Court's approach in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996). *Harmon* distinguishes between agency opinions on the substantive meaning of regulations—which are entitled to deference—and agency opinions on the preemptive scope of regulations—which are not. The Sixth Circuit's decision does not implicate *Harmon*, as the court did not defer to the OCC's view on whether its regulations are entitled to preemptive effect. As noted in the Solicitor General's Brief in *Burke*, *Harmon* is distinguishable from this case because "[t]here is no dispute that application of the relevant [state] banking laws to Wachovia Mortgage would conflict directly with the Comptroller's regulations, and the court of appeals did not rely on deference principles in reaching that conclusion." Solicitor General's Brief, p. 20.

Petitioner also misapplies the holding in *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), where the Court rejected an interpretation of the Controlled Substance Act by the Attorney General. (Pet. at 23-24.) The Court concluded that *Chevron* deference did not apply because it found that Congress did not give the Attorney General rulemaking power to declare illegitimate a medical standard for care and treatment of patients. 126 S. Ct. at 916-17. In contrast, this Court has held that the OCC *does* have primary authority to define the scope of "incidental powers" that are "necessary" for a national bank "to carry on the business of banking." *Nationsbank*, 513 U.S. at 256, 258-260, 264. The OCC appropriately exercised that authority here.

Similarly, in *American Bar Association v. Federal Trade Commission*, 430 F.3d 457 (D.C. Cir. 2005), also cited by

Petitioner as a "conflict," the Court rejected a contention that *Chevron* applies any time a statute does not expressly negate the existence of a claimed administrative power. (Pet. at 24-25.) However, neither Respondents nor the Sixth Circuit relied on a negative inference to find OCC rulemaking authority over a national bank and its incidental powers. Rather, as in *Nationsbank*, the Sixth Circuit relied on the express statutory language granting such authority to the OCC.

Because the Sixth Circuit below did not, as Petitioner suggests, decide the propriety of deferring to a purely legal interpretation of the preemptive scope of the statute or regulation at issue, nor step outside the statutory footprint for the OCC's rulemaking authority, the cases Petitioner cites as inconsistent do not, in fact, conflict with the decision below. Accordingly, the split among the courts of appeals that Petitioner asserts does not exist.

B. The Sixth Circuit Properly Concluded That The National Bank Act And OCC Regulations Preempt State Law.

1. The NBA Is Silent Regarding The Use Of Operating Subsidiaries, And Thus Chevron Deference Is Properly Invoked.

In contending that the decision below is wrong, Petitioner's principal argument is that the OCC overreached its authority because the agency redefined the term "national bank." Pet. at 8-13. The Solicitor General's Brief in *Burke* addressed this argument succinctly:

> [I]n establishing that state laws – including the exercise of state visitorial powers – may be applied to an operating subsidiary only to the same extent as to the parent national bank, the OCC did not purport to interpret the term "national bank" in Section 484(a) to include an operating subsidiary. ... Rather, the OCC construed the term "incidental powers," in 12

> U.S.C. 24 Seventh, to encompass the conduct of activities through an operating subsidiary. A straightforward incident of authorizing a national bank to conduct its activities through an operating subsidiary is that the subsidiary should no more be constrained by state law (including state laws concerning visitation) than the parent bank. Accordingly, Section 24 Seventh, coupled with Section 484(a), "provides the OCC with ample authority to preempt states from exercising visitorial power over the subsidiary because such regulation could interfere with the national bank's exercise of its federal powers."

Solicitor General's Brief, p. 15.

Petitioner also asserts that the NBA is not ambiguous or silent regarding operating subsidiaries.[7] She bases this strained position on the simple fact that § 484's limits on visitorial powers do not mention "affiliates" of national banks. (Pet. at 9-10, 12-14.) Petitioner concludes that the absence of "affiliates" in the language of § 484 is evidence that Congress intended to limit the visitorial powers of § 484 to national banks themselves. (Pet. at 13.) This argument combines a fragmented view of the OCC's authority with an entirely unwarranted inference of intent from a Civil War-era statute.

The text of 12 U.S.C. § 484 is not the sole determinant of the OCC's authority over national banks and their operating subsidiaries. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121, 133 (2000) (emphasizing the need

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[7] This is the opposite position of that taken by Petitioner before the district court, where Petitioner admitted that the statute is ambiguous. Before the Sixth Circuit, Petitioner argued that the district court erred by following her counsel's "suggestion" that the statute is ambiguous.

to be "guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision ... to an administrative agency," and stressing the importance of considering statutory language, not in isolation, but in context). Indeed, the NBA granted the OCC not only exclusive visitorial authority over national banks but also the responsibility to define and administer the incidental powers of national banks. Petitioner fails to cite to any statutory language in which Congress spoke to "the precise question" of how federal law affects state laws when a national bank, exercising its incidental powers under § 24, uses an operating subsidiary to engage in mortgage lending. *See Chevron*, 467 U.S. at 842-43 (holding that when Congress has not addressed "the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation") (footnote omitted). As "the administrator charged with supervision of the National Bank Act," *NationsBank*, 513 U.S. at 256, the OCC has ample authority to declare whether national banks may use operating subsidiaries to engage in mortgage lending and to determine the regulatory consequences of these efforts. No court that has considered the question has accepted the Petitioner's argument that the NBA's language is dispositive.

In this instance, deferral to the OCC is especially warranted because it is obvious that congressional silence in §§ 221a(b) and 484 about operating subsidiaries signifies not intent but unawareness. Congress first enacted § 484 in 1864, Rev. Stat. § 5240, derived from Act June 3, 1864, ch. 106, 13 Stat. 99 (codified as amended at 12 U.S.C. § 484), and § 221a in 1933, June 16, 1933, ch. 89, § 2, 48 Stat. 162 (codified as amended at 12 U.S.C. § 221a). The practice of using operating subsidiaries to conduct the business of banking – as opposed to using separate corporate affiliates for non-banking business – was first recognized decades later, in the 1960s.

Petitioner also argues that by not adding a reference to operating subsidiaries or "affiliates" to § 484 in 1982 and 1983 when the statute was amended, Congress was indicating that it did not believe that section covered operating subsidiaries. (Pet. at 13-14.) The Sixth Circuit, like the Second and Ninth before it, rejected this argument, stating:

> The statutes cited that include the term "affiliate" – section 161(c), section 371c, section 371c-I, and section 481 – establish the duties of a national bank to report on the activities of its affiliates and the bank's relationship with its affiliates. In order to be comprehensible, the statues must mention "affiliates." This does not mean, however, that any statute that does not mention "affiliates" reflects the unambiguous intent of Congress to exclude them from the provision. If anything, it indicates that Congress has only included reference to affiliates in the limited cases where they must be distinguished from national banks. Michigan and amici have pointed to no statutory sections that do not specifically pertain to the relationship between national banks and their affiliates that contain the term "affiliates" or "operating subsidiaries."

Watters, 431 F.3d at 562 (Pet. App. 10a). *See also Burke*, 414 F.3d at 317-18, *Boutris*, 419 F.3d at 959 n.12, and Solicitor General's Brief, p. 15 n.8.

The evolution of the incidental powers of national banks to engage in the business of banking, as recognized by the OCC, created the operating subsidiary. Through 12 C.F.R. §§ 5.34 and 7.4006, the OCC has incorporated the relatively new operating subsidiary into the National Bank Act's regulatory scheme. In so doing, the OCC has performed a fundamental agency function: it has interpreted policies found in the NBA that are unclear in their application to operating subsidiaries and has interpreted "the meaning [and] reach" of

certain provisions of the NBA under circumstances that require a "full understanding of the force of the statutory policy in the given situation." *See Chevron*, 467 U.S. at 844-45. Under these circumstances, the OCC's interpretation must be accorded great deference. *Smiley*, 517 U.S. at 739; *NationsBank*, 513 U.S. at 256. Accordingly, the Sixth Circuit correctly recognized that Congressional silence in this instance leads to deference under *Chevron*, rather than a negative inference that Congress intentionally omitted operating subsidiaries from the scope of the OCC's exclusive visitorial authority.

2. *The Sixth Circuit's Preemption Analysis Was Proper.*

Petitioner also argues that Congress did not expressly state that it intended to preempt state law, and that absent such express statutory preemption, the "traditional" presumption against preemption must apply. (Pet. at 16.) However, as this Court held in *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law." 458 U.S. 141, 154 (1982). Indeed, Petitioner's demand for explicit evidence of congressional intent to preempt despite the OCC's regulations reflects precisely the kind of "narrow focus on Congress' intent to supersede state law" that this Court found to be "misdirected" in *de la Cuesta*. *Id.*

The holding in *de la Cuesta* concerned the enforceability of "due on sales" clauses, which allow a mortgage lender to accelerate a promissory note if the mortgaged property is sold or transferred without the lender's permission. 458 U.S. at 144-45. The Federal Home Loan Bank Board, the predecessor to the Office of Thrift Supervision, adopted regulations permitting federal savings and loan associations to use "due on sale" clauses. *Id.* California, however, by statute and judicial precedent, generally considered these clauses unenforceable. *Id.* at 148-49. Finding no express Congres-

sional intent to preempt and relying on the strong local interest in real estate, the California Court of Appeals upheld the California law over claims of preemption. *Id.* at 150-53. This Court reversed, eschewing as "misdirected" a narrow search for express Congressional intent to preempt, and applied a different standard: "[w]here Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." *Id.* at 153-54 (citing *United States v. Shimer*, 367 U.S. 374, 381-82 (1961)); *see Lynnbrook Farms v. Smithkline Beecham Corp.*, 79 F.3d 620, 623-24 (7th Cir.), *cert. denied*, 519 U.S. 867 (1996) ("In ascertaining whether an agency has acted properly in preempting state law, it is significant to note that an express Congressional authorization to displace state law in the delegating statute is unnecessary") (citing and explaining *de la Cuesta*).[8]

After *de la Cuesta*, the real issue is not whether Congress specifically intended to preempt, but instead whether the agency was authorized to issue the preemptive regulation. Here, there can be no doubt about that. The OCC's authority to administer and interpret the NBA is well established. *See, e.g., NationsBank*, 513 U.S. at 256-57 (quoting precedent and concluding that "[t]he Comptroller of the Currency is charged with the enforcement of banking laws to an extent

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[8] *See also* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 26-27 (Jan. 1983) ("[U]nless one is prepared to rethink fundamentally the role of public administration in our constitutional order, article III, standing alone, is not violated by judicial deference to administrative construction of law. Enforcement of other constitutional restrictions aside, the only judicial task is to determine what statutory authority has been conferred upon the administrative agency. Once it has done so, the court has discharged its duty to say what the law is. This is no novel perception.") (footnotes omitted).

that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws." (internal quotation marks omitted); *see also United States v. Mead Corp.*, 533 U.S. 218, 231 n. 13 (2001) (noting the high degree of deference accorded the Comptroller's interpretation of the National Bank Act). The OCC's "determination as to what activities are authorized under the National Bank Act should be sustained if reasonable." *First Nat'l Bank of Eastern Ark. v. Taylor*, 907 F.2d 775, 777-78 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990) (*citing Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 406, 409 (1987)). Each of the regulations at issue in this appeal falls well within the OCC's authority. *See also* Solicitor General's Brief, p. 11.

In adopting 12 C.F.R. § 5.34, the OCC determined that the incidental powers that Congress granted to national banks in 12 U.S.C. § 24 (Seventh) include the authority to use operating subsidiaries to conduct banking business. In *NationsBank*, this Court held that the Comptroller has discretion to authorize national banks to engage in activities beyond those "specifically enumerated" in § 24 (Seventh). *NationsBank*, 513 U.S. at 258 n.2. In essence, the Court agreed with the OCC's construction of § 24 Seventh's authorization of "incidental powers ... necessary to carry on the business of banking" as "an independent grant of authority" beyond the other specific powers set forth in § 24 (Seventh). *Id.* at 257-58. The Court also confirmed that the Comptroller has broad authority to prescribe the incidental powers of national banks, provided that the powers are within the reasonable bounds of activities connected with banking. *Id.* at 258 n.2. The Court then held that the OCC "reasonably concluded that the authority to sell annuities qualifies as part of, or incidental to, the business of banking." *Id.* at 258. Certainly, using an operating subsidiary to offer mortgage loans likewise falls within the reasonable bounds of "banking." *See* 12 U.S.C. § 371(a); 12 C.F.R. § 34.1; Solicitor General's Brief, pp. 16-17.

Moreover, 12 C.F.R. § 7.4000(a), which provides that the OCC alone may visit national banks, is entirely consistent with 12 U.S.C. § 484, which expressly bars states from exercising visitorial powers over national banks (subject to limited exceptions not applicable here). *See* 12 U.S.C. § 484(b). This statute entrusts the OCC with the responsibility to examine national banks' compliance with federal and applicable state law. *See* Interpretive Letter No. 614, [1992-1993 Transfer Binder] Fed. Banking L. Rep. ¶ 83,454 (Jan. 15, 1993); *Nat'l State Bank v. Long*, 630 F.2d 981 (3rd Cir. 1980) (holding that the OCC, rather than the state banking commissioner, was authorized under § 484 to enforce a state law against a national bank); *First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 132, 145-46 (D. Conn. 1999) (rejecting state commissioner's authority to conduct administrative enforcement proceedings against national banks and confirming the OCC's exclusive authority over such proceedings).[9]

Likewise, 12 C.F.R. § 7.4006, which addresses the extent to which state laws apply to operating subsidiaries of national banks, finds solid support in the power of national banks to use operating subsidiaries for banking business and the preemptive force of federal statutes and regulations. Indeed, in

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[9] In *First Union*, Judge Arterton flatly rejected the Commissioner's argument that *Long* was an "aberration." *First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 132, 145-46 (D. Conn. 1999). More recently, the Third Circuit invoked *Long* to support its conclusion that the OCC, "the primary regulator of national banks pursuant to authority granted by the National Bank Act," had authority to regulate the activities of a national bank and its operating subsidiary with regard to soliciting potential credit card members. *Roberts v. Fleet Bank (R.I.), N.A.*, 342 F.3d 260, 269-70 & n. 5 (3d Cir. 2003); *see also Wells Fargo Bank of Tex., N.A. v. James*, 321 F.3d 488, 490 (5th Cir. 2003) ("The Office of the Comptroller of the Currency (OCC) is the agency empowered by the NBA to supervise and regulate federally chartered banks in accordance with the broad substantive provisions of the NBA.").

adopting this regulation after due notice and comment, the OCC noted that "operating subsidiaries are, in essence, incorporated departments or divisions of the bank and, accordingly, should not be treated differently than their parent banks under State laws." 66 Fed. Reg. 34,784, 34,788 (July 2, 2001).

3. Petitioner's Consumer Protection Arguments Do Not Make The Sixth Circuit's Preemption Finding Erroneous.

Petitioner argues at considerable length that Michigan's statutes should not be preempted because the regulation of operating subsidiaries allows Petitioner to "protect consumers from unfair, unsound, and abusive lending practices," and that "[t]he regulation of operating subsidiaries ... is a matter of vital importance to states." (Pet. at 4, 28-29.) As an initial matter, Petitioner is incorrect in arguing that consumers will be left without protection if the Michigan laws at issue here are preempted, as the OCC continues in this role. In *WFS Financial*, the court dismissed this same argument:

> To read defendants' brief, one might think that the scheme envisioned by the Office of Thrift Supervision is nothing but a ploy to permit corporate subsidiaries of federal savings and loan associations to bilk the public with impunity, free from all laws and regulation, while giving the parent complete protection from any liability resulting from the actions of its unregulated offspring. The truth is that the subsidiary is exempt from only those laws and regulations that preemption principles would bar the state from applying to the savings and loan association that engaged in the same acts. It cannot exist as an operating subsidiary without the prior approval of the Office of Thrift Supervision. It is not exempt from federal laws and regulations that govern loans, consumer loan disclosures, loan fees and interest

> rates, any more than its parent is. Furthermore, it is subject to the same kind of regulation and monitoring as its parent to insure that it is operated in a way that will maintain the viability of its parent and the solvency of the federal deposit insurance system. See 12 U.S.C. § 1828m.

WFS Fin., 79 F. Supp. 2d at 1028; *see also Nat'l State Bank v. Long*, 630 F.2d 981 (3rd Cir. 1980) (holding that the OCC had exclusive enforcement authority over national banks).

Moreover, Petitioner's plea is misdirected. As this Court made clear in *Franklin National Bank v. New York*, 347 U.S. 373 (1954), courts do not weigh relative merits of state laws that conflict with federal authority. *Franklin National* concerned a New York statute that was purportedly designed to protect consumers. The New York law prohibited Franklin National and other commercial banks from using the word "saving" or "savings" in advertisements to avoid the possibility that consumers would confuse these banks with state-chartered mutual savings banks. *Id.* at 374. This Court refused to consider the merits of the state statute or to be swayed by a special local interest that New York claimed in this legislation:

> There appears to be a clear conflict between the law of New York and the law of the Federal Government. **We cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the Federal Government resolves them as a matter of supremacy. However wise or needful New York's policy, a matter as to which we express no judgment, it must give way to the contrary federal policy.**

Id. at 378-79 (emphasis added; footnotes omitted). Accordingly, in addition to her failure to recognize the role of the OCC, Petitioner attempts to distort the Court's function by

invoking "consumer protection" and "local interest" in hopes of avoiding conflict preemption.

In fact, the Court consistently has applied the understanding that "'[t]he relative importance to the State of its own law is not material when there is a conflict with valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *de la Cuesta*, 458 U.S. at 153 (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). As the Court has held, courts "cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the Federal Government resolves them as a matter of supremacy. However wise or needful [a state's policy], ... it must give way to the contrary federal policy." *Watters*, 431 F.3d at 563 (Pet. App. 12a), citing *Franklin Nat'l Bank*. Indeed, even where the state has a "compelling interest" in preservation of its law, "under the Supremacy Clause, from which our preemption doctrine is derived, any state law, ... clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (plurality opinion) (internal quotation marks and citations omitted).

In a similar argument, Petitioner attacks the OCC regulations and interpretative letters by noting that states have a strong interest in "protecting" customers from the operations of national banks within their jurisdiction. (Pet. at 17-18) (quoting House-Senate Conf. Comm. Report on Riegle-Neal Interstate Banking Act, H.R. Rep. 103-651, at 53, reprinted in 1994 U.S. Code Cong. & Admin. News 2068, 2074.) As *Franklin National* made clear, however, this "local interest," whatever its merits, does not outweigh the Supremacy Clause. *Franklin National*, 347 U.S. at 378-79. Additionally, the comments of some legislators during debates over Riegle-Neal do not displace the OCC's authority over national banks and its ability to determine the preemptive scope of the National Bank Act and federal regulations. Indeed,

when rejecting the same argument, the district court in *Burke* aptly pointed out that, notwithstanding aspects of the debate, Congress adopted a statute that affords exclusive enforcement authority to the OCC:

> Although the legislative history of the Riegle Neal Interstate Banking Act contains some Congressional expression of concern that the OCC historically may have been too willing to find state laws preempted and not enforceable, Congress granted the OCC exclusive enforcement authority over interstate branches' compliance with state banking laws and required it to maintain a report of its preemption determinations for Congressional review under 12 U.S.C. § 36(f)(C).

First Union N.A. v. Burke, 48 F. Supp. 2d at 146 (footnote omitted).

Also unpersuasive is Petitioner's challenge to the OCC's visitorial authority based on a string of older decisions of this Court. (Pet. at 18-19) (citing *McClellan v. Chipman*, 164 U.S. 347 (1896); *Davis v. Elmira Savings Bank*, 161 U.S. 275 (1896); *First Nat'l Bank v. Missouri*, 263 U.S. 640 (1924); *Wichita Royalty Co. v. City Nat'l Bank*, 306 U.S. 103 (1939); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233 (1944)). Petitioner fails to acknowledge that only one of these decisions considers the visitorial authority of the OCC in any depth, and none cites to § 484.[10] Moreover, cases such as *McClellan* dealt with state laws that were not expressly preempted and had only an incidental effect on na-

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[10] Indeed, almost all of these are civil cases that are entirely irrelevant to the attempted exercise of regulatory authority by a state sovereign. The only case involving a dispute over banking laws between a national bank and a state, *First National Bank v. Missouri*, 263 U.S. 640 (1924), has since been superseded by the McFadden Act, 12 U.S.C. § 36(c).

tional banks, unlike this case, where there is express preemption and conflict preemption under the NBA.

C. Preemption Here Does Not Violate The Tenth Amendment Of The United States Constitution.

Petitioner contends that preemption by the OCC violates the State of Michigan's sovereignty under the Tenth Amendment. U.S. CONST. AMEND X. There is no merit to this argument, and it does not justify granting the petition.

The Tenth Amendment states, in relevant part, that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." It can hardly be doubted that the Constitution authorizes Congress to establish national banks. *See McCulloch v. Maryland*, 17 U.S. 316, 424-25 (1819). *See also Clark v. United States*, 184 F.2d 952, 954 (10th Cir. 1950), *cert. denied*, 340 U.S. 955 (1951) ("Congress has the power to enact legislation for the protection, preservation and regulation of [national banks]"). Those courts that have considered whether the Tenth Amendment precludes the OCC from exercising exclusive authority over national banks and/or their operating subsidiaries therefore have rejected the contention. *See e.g.*, *First Union Nat'l Bank v. Burke*, 48 F. Supp.2d 132, 148 (D. Conn. 1999). *See also Wells Fargo*, 265 F. Supp. 2d at 1170-71 (citing *First Union Nat'l Bank* with approval); and *Nat'l City Bank of Indiana v. Boutris*, 2003 WL 21536818, *3 (E.D. Ca. 2003).

That conclusion is consistent with this Court's recognition that lending activities by national banks have a broad impact on the national economy, and therefore are covered by the Commerce Clause. *U.S. Bank v. Alafabco, Inc.*, 539 U.S. 52, 58 (2003). Indeed, since there is clearly a rational basis to conclude that the regulated activity at issue here affects interstate commerce, the exercise of federal power is

valid under the Commerce Clause. *United States v. Lopez*, 514 U.S. 549, 557 (1995).

Petitioner's reliance on *Solid Waste Agency of Northern Cook County v. United States Army Corp of Engineers*, 531 U.S. 159 (2001) is misplaced. In that case, the Court found that the statute was clear, so no administrative deference was appropriate. It also found that the administrative interpretation at issue "invokes the outer limits of Congress' power" (*id.* at 172), a dramatically different situation than the one presented here, dealing with the long-standing recognition of federal authority under the Commerce Clause with respect to banking matters.

The underlying premise of Petitioner's argument is that the states have a constitutional right to monitor and regulate the activities of companies that are incorporated under state law. But the OCC has not converted state-chartered corporations into nationally chartered corporations. Instead, federal law and regulations simply preempt the exercise of certain state authority over particular types of corporations. This type of regulation raises no Tenth Amendment issues.

Finally, the case of *Hopkins Federal Savings & Loan Ass'n v. Cleary*, 296 U.S. 315 (1935), cited by Petitioner as holding that the Tenth Amendment was violated by a provision of the Federal Home Owners' Loan Act, did not involve a situation "where the central government is at liberty (as it is under the commerce clause when such a purpose is disclosed) to exercise a power that is exclusive as well as paramount." *Id.* at 337. In contrast, this case does involve a statute where Congress has expressly stated the national interest in the regulation of national banks is paramount.

As a result, the Sixth Circuit properly held that the exercise of federal power is appropriate and not barred by the Tenth Amendment.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

LINDA A. WATTERS, COMMISSIONER, MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES,

Petitioner,

v.

WACHOVIA BANK, N.A., et al.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE STATES OF IOWA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, NEW JERSEY, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, WASHINGTON, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Do regulations issued by the Office of the Comptroller of the Currency qualify for *Chevron* deference even though those regulations preempt the states' authority to regulate state-chartered, non-bank corporations that are operating subsidiaries of national banks?

2. Do regulations issued by the Office of the Comptroller of the Currency infringe upon the states' sovereign powers protected by the Tenth Amendment to the United States Constitution by vesting that agency with exclusive authority to regulate state-chartered, non-bank corporations that are operating subsidiaries of national banks?

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INTEREST OF *AMICI CURIAE*

Amici are officials of 32 states and the District of Columbia who administer or enforce state laws regulating mortgage lenders and other providers of financial services. Throughout this nation's history, the states have played leading roles in promulgating and enforcing laws designed to protect consumers against abusive and unfair practices by financial service providers. In the decision below, the Sixth Circuit Court of Appeals upheld regulations issued by the Office of the Comptroller of the Currency ("OCC"), which vest the OCC with exclusive supervisory control over all state-chartered corporations that are operating subsidiaries of national banks. The OCC's regulations effectively bar the states from regulating an important category of state-chartered corporations for the purpose of preventing fraudulent or unscrupulous financial activities. The decision below is of great concern to *amici*, because it undermines federalism principles that are cornerstones of our systems of financial regulation and corporate governance. *Amici* therefore have a compelling interest in supporting the petition for writ of certiorari in this case.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit Erred in Granting *Chevron* Deference to the OCC's Regulations.

A. The Sixth Circuit mistakenly applied a presumption in favor of the OCC's authority to adopt its preemptive rules.

The Sixth Circuit upheld regulations issued by the OCC, which declare that the OCC possesses exclusive authority to regulate state-chartered corporations that are operating subsidiaries of national banks.[1] The core of the

[1] Under the OCC's regulations, a subsidiary of a national bank qualifies as an "operating subsidiary" if (i) the subsidiary engages in "activities that are permissible for a national bank to engage in

(Continued on following page)

OCC's preemption claim is set forth in 12 C.F.R. § 7.4006. Section 7.4006 asserts that, unless otherwise provided by federal law, "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." When the OCC adopted § 7.4006, the agency claimed that operating subsidiaries are "the equivalent of departments or divisions of their parent banks." 66 Fed. Reg. 34,784, 34,788 (2001); *see also* 69 Fed. Reg. 1895, 1900 (2004) (contending that operating subsidiaries are "in essence, no more than incorporated departments of the [parent] bank itself").

Operating in combination with two other OCC rules that apply to national banks, § 7.4006 divests the states of their authority to regulate the activities and corporate governance of all state-chartered operating subsidiaries. First, 12 C.F.R. § 7.4000(a) provides that "State officials may not exercise any visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law."[2] Second, under 12 C.F.R. § 7.2000(a), every "corporate governance procedure" of a national bank must "comply with applicable Federal banking statutes and regulations." Federal banking laws and the OCC's rules dictate a wide range of corporate governance matters for national banks, including the appointment and dismissal of officers; provisions dealing with capital stock and dividends; shareholders' voting rights (including a requirement for cumulative voting in all elections of directors); numbers

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directly," and (ii) the parent bank "controls" the subsidiary. 12 C.F.R. § 5.34(e)(1), (2).

[2] The OCC issued 12 C.F.R. § 7.4000 in reliance on 12 U.S.C. § 484(a). Section 484(a) limits the exercise of "visitorial powers" **only** with respect to a "national bank" and does **not** refer to operating subsidiaries or other affiliates of a national bank. *See* Petition for Writ of Certiorari ("Pet. Cert.") 8-9, 12-15.

and qualifications of directors; required oaths for directors; and approvals of mergers and consolidations.[3] By their terms, 12 C.F.R. §§ 7.4000 and 7.2000 apply only to "national banks." However, § 7.4006 makes both rules applicable to state-chartered operating subsidiaries, thereby preempting the states' authority to regulate such corporations' business activities or to supervise their corporate governance.

The Sixth Circuit concluded that 12 C.F.R. §§ 7.4000 and 7.4006 preempted several Michigan statutes. Those state statutes require state-chartered, non-bank mortgage lenders to register with the Commissioner of the Michigan Office of Insurance and Financial Services (the "Commissioner"), to provide annual financial statements and to pay annual fees to the Commissioner, to maintain certain documents for review by the Commissioner, and to permit the Commissioner to conduct investigations of consumer complaints that are not being pursued by the OCC. In practical effect, the Sixth Circuit's decision divested the Commissioner of all authority to regulate state-chartered operating subsidiaries.[4]

In rejecting the Commissioner's challenge to the OCC's rules, the Sixth Circuit held that there was no need to decide "whether Congress has expressly and clearly manifested its intent to preempt state laws such as Michigan's." Pet. App. 6a-7a & n.3. The Sixth Circuit cited *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), where this Court held that "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law" and that a state court's "narrow focus on Congress' intent to supersede state law

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[3] *See* 12 U.S.C. §§ 24(Fifth), 51a-61, 71-76, 215-215c; 12 C.F.R. §§ 5.33, 7.2000-7.2024.

[4] *See* Appendix to Petition for Writ of Certiorari ("Pet. App.") 2a & n.1, 3a-4a (describing Michigan laws preempted by the OCC's rules); Pet. Cert. 5-6 (same).

was misdirected." *Id.* at 154. Read in context, the foregoing statements indicate that a specific statement of Congress' preemptive intent is not required in the statutory text if the overall statutory scheme shows that Congress contemplated the adoption of agency rules displacing state law. This Court found in *de la Cuesta* that § 5(a) of the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. § 1464(a), granted "plenary authority" to the Federal Home Loan Bank Board "to regulate the lending practices of federal savings and loans. . . . Congress plainly envisioned that federal savings and loans would be governed by what the Board – not any particular State – deemed the 'best practices' [of thrift institutions]." *Id.* at 160-61. This Court concluded that "the statutory language [of HOLA] suggests that Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law." *Id.* at 162.

Contrary to the Sixth Circuit's apparent view, *de la Cuesta* does not relieve a reviewing court of its duty to determine whether a federal agency's preemptive rule is consistent with congressional intent. In *de la Cuesta*, this Court carefully considered "whether the Board acted within its statutory authority in issuing the pre-emptive . . . regulation." *Id.* at 159. Similarly, in *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), this Court declared that "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Id.* at 369. Therefore, a reviewing court must invalidate any preemptive rule that exceeds the authority granted to the federal agency by Congress:

> [A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether

> Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of authority granted by Congress to the agency.[5]

The Sixth Circuit concluded that it was required to defer to the OCC's rules under "the framework established by *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)." Pet. App. 7a. The Sixth Circuit interpreted *Chevron* as obliging it to "give great weight to any reasonable construction" of the national banking statutes by the OCC as long as those statutes were "silent or ambiguous." Pet. App. 8a (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403 (1987), and *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995)). However, the Sixth Circuit failed to recognize that neither *Clarke* nor *NationsBank* involved a federal agency regulation that purported to preempt state law. Instead, those cases dealt with the proper interpretation of federal statutes that placed limits on the permissible activities of national banks.

In basing its decision on *Chevron* deference, the Sixth Circuit agreed with prior decisions of the Second and Ninth Circuits, which also upheld the OCC's preemptive rules regarding state-chartered operating subsidiaries.[6] All three courts upheld the OCC's rules under *Chevron* because they found the national banking laws to be silent on the issue of whether the OCC possesses sole and exclusive supervisory control over operating subsidiaries. In the view of all three courts, the OCC enjoyed free rein to adopt

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[5] *Id.* at 374. *See also, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (declaring that "the purpose of Congress is the ultimate touchstone in every pre-emption case") (internal quotation marks and citation omitted).

[6] *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), *petition for cert. filed*, No. 05-431 (U.S., Sept. 30, 2005); *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005).

its preemptive regulations in the absence of a "manifest congressional intent" that would prohibit such rules.[7]

The application of *Chevron* by all three courts was fundamentally flawed. Their approach effectively created a presumption **favoring** the OCC's authority to issue regulations preempting state law – a presumption that could **not** be overcome without evidence that Congress had expressed an "unambiguous intent" to prohibit the OCC from adopting such rules. *See* Pet. App. 8a-10a. As a consequence, all three decisions conflict with this Court's well-established presumption **against** preemption of state law, as well as the proper limits of judicial deference under *Chevron* and its progeny.

B. The Sixth Circuit should have applied a presumption against preemption of the states' authority to regulate state-chartered, non-bank mortgage lenders.

The Sixth Circuit refused to apply a presumption against preemption of Michigan's laws governing state-chartered, non-bank mortgage lenders. The Sixth Circuit held that this presumption was inapplicable because "[r]egulation of federally-chartered banks" is an area that has been "substantially occupied by federal authority for an extended period of time." Pet. App. 7a, n.3 (quoting *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005)). The Second and Ninth Circuits similarly refused to apply a presumption against preemption in

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[7] *See Burke*, 414 F.3d at 317-18 (finding "no manifest congressional intent to preclude the OCC regulations in this case" because "no [federal] statute speaks directly to the scope of federal versus state power over [operating subsidiaries]"); Pet. App. 9a-10a (quoting *Burke* and reaching same conclusion); *Boutris*, 419 F.3d at 961 & n.12 (stating that "the [National] Bank Act is silent" as to the OCC's authority to regulate operating subsidiaries and, therefore, Congress has not "unambiguously expressed [its] intent" to bar the OCC from issuing its preemptive rules) (internal quotation marks and citation omitted).

upholding the same OCC rules that are involved in this case.[8] The position of all three Circuits conflicts with at least two prior federal court decisions, which **did** apply a presumption against preemption in determining the applicability of state laws to national banks.[9]

The Second, Sixth and Ninth Circuits were clearly mistaken in view of this Court's decisions affirming the states' significant role in regulating national banks. In *Atherton v. FDIC*, 519 U.S. 213 (1997), this Court declared that "federally chartered banks are subject to state law." *Id.* at 222. As support for that principle, this Court cited decisions reaching back to an 1870 case, which held that national banks

> . . . are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when State law incapacitates the [national] banks from discharging their duties to the federal government that it becomes unconstitutional.

Id. at 222-23 (quoting *National Bank v. Commonwealth of Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870)).

Similarly, in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), this Court held that states have "the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with

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[8] *Burke*, 414 F.3d at 314; *Boutris*, 431 F.3d at 956.

[9] *National State Bank v. Long*, 630 F.2d 981, 985-87 (3d Cir. 1980); *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp.2d 1041, 1048-49 (S.D. Fla.), *aff'd*, 205 F.3d 1358 (11th Cir. 1998) (per curiam), *cert. denied*, 531 U.S. 822 (2000).

the national bank's exercise of its powers."[10] *Atherton* and *Barnett Bank* are consistent with the presumption against preemption that this Court has repeatedly applied in fields of traditional state regulation, including state legislation designed to protect consumers against abusive or unsafe practices in the sale of goods or services.[11]

In *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), this Court held that the presumption against preemption by federal law applies

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[10] *Id.* at 33. *See also, e.g., Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944) (holding that "national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions"); *McClellan v. Chipman*, 164 U.S. 347, 357 (1896) (holding that "the operation of general state laws upon the dealings and contracts of national banks" is the "rule", while preemption is an "exception" that applies only when state laws "expressly conflict with the laws of the United States or frustrate the purpose for which national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States").

[11] *E.g., Medtronic v. Lohr*, 518 U.S. at 475, 484-85; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516-20 (1992); *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-44, 146-47, 150 (1963). In refusing to apply a presumption against preemption of the state laws displaced by the OCC's regulations, the Second and Ninth Circuits mistakenly relied on *United States v. Locke*, 529 U.S. 89 (2000). *See Burke*, 414 F.3d at 314; *Bank of Am. v. City and County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002), cited in *Boutris*, 419 F.3d at 956. In *Locke*, this Court declined to apply a presumption against preemption in striking down state laws that imposed restrictions on oil tankers operating in navigable waterways. This Court emphasized that the challenged state laws sought to regulate "national and international maritime commerce", an area in which Congress had shown a strong desire to establish a "uniformity of regulation." *Id.* at 108. By contrast, in *Atherton*, after reviewing the long history of state regulation of national banks, the Supreme Court held that federal policy did **not** require any "uniformity" of regulatory treatment for federally-chartered banks. 519 U.S. at 219-26. Thus, *Locke* does **not** support the Sixth Circuit's refusal to apply a presumption against preemption in this case.

not only to federal statutes but also when "the field [of traditional state concern] is said to have been pre-empted by an agency, acting pursuant to congressional delegation." *Id.* at 715-16. In such a case, preemption will be found only if there is "a conflict between a particular [state law] and the federal scheme, that is strong enough to overcome the presumption that state and local regulation . . . can constitutionally coexist with federal regulation." *Id.* at 716.

Congress expressed its strong support for the presumptive application of state laws to national banks when it passed the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 ("Riegle-Neal Act"). In explaining why state laws should generally apply to national banks, the conference report on the Riegle-Neal Act declared:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses and communities. . . .
>
> Under well-established judicial principles, national banks are subject to State law in many significant respects. . . . Courts generally use a rule of construction that avoids finding a conflict between the Federal and State law where possible. The [Riegle-Neal Act] does not change these judicially established principles.

H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.) (emphasis added), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

In addition to their refusal to recognize the states' important role in regulating national banks, the Second, Sixth and Ninth Circuits failed to appreciate the significance of the OCC's attempt to obliterate the legal distinction between national banks and their state-chartered operating subsidiaries. By disregarding the separate legal

status of operating subsidiaries, the OCC claimed power to override the states' authority to regulate thousands of state-chartered, non-bank corporations controlled by national banks. Yet this Court has repeatedly affirmed the authority of each state (i) to supervise comprehensively the corporations it charters, and (ii) to license and regulate companies chartered by other states that transact business within its borders. With regard to locally-chartered companies, this Court has declared:

> No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. . . .
>
> . . . .
>
> It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares.

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 89, 91 (1987).

With regard to foreign corporations, this Court has held that each state "is legitimately concerned with safeguarding the interests of its own people in business dealings with corporations not of its own chartering but who do business within its borders." *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 208 (1944). Each state may therefore require foreign corporations to comply with licensing requirements and other regulations designed to "assur[e] responsibility and fair dealing." *Id.* at 210. *Jensen*'s confirmation of the states' authority to regulate foreign corporations is directly relevant to this case, because Respondent Wachovia Mortgage Corporation has obtained a certificate of authority to conduct business in Michigan as a foreign non-bank corporation. Pet. Cert. 5-6, 20-21.

This Court has consistently interpreted federal statutes in a manner that affirms the states' long-established authority to regulate state-chartered corporations, absent compelling evidence of congressional intent to the contrary.[12] In the field of financial services, this Court has recognized the states' strong interest in regulating both banks and non-bank financial institutions, because "sound financial institutions and honest financial practices are essential to the health of any State's economy and to the well-being of its people." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980).

In addition to its affirmation of state control over state-chartered corporations, this Court has declared that the separate legal status of a subsidiary and its parent corporation is "[a] basic tenet of American corporate law." *Dole Food Corp. v. Patrickson*, 538 U.S. 468, 474 (2003); *accord, United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998). Accordingly, this Court has consistently applied a presumption that federal statutes embody the principle of corporate separation absent clear evidence that Congress intended a different result.[13]

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[12] *E.g., CTS Corp.*, 481 U.S. at 85, 86 (refusing to construe a federal statute to "pre-empt a variety of state corporate laws of hitherto unquestioned validity," because the "longstanding prevalence of state regulation in this area suggests that if Congress had intended to pre-empt all [such] state laws . . . it would have said so explicitly"); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) ("Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly when established state policies of corporate regulation would be overridden").

[13] *E.g., Dole Food*, 538 U.S. at 475-76 (refusing to conclude that "all subsidiaries are deemed to be the same as the parent corporation," because "[t]he text of the [relevant statute] gives no indication that Congress intended us to depart from the general rules regarding corporate formalities"); *Bestfoods*, 524 U.S. at 62 (rejecting a proposed interpretation of a federal statute that would impose automatic liability on a parent corporation for the acts of its subsidiary, because "nothing

(Continued on following page)

Contrary to this Court's decisions upholding state corporate regulation and corporate separation, the OCC asserts that state-chartered operating subsidiaries are "indistinguishable" from their parent national bank and "in essence, no more than incorporated departments of the bank itself." 69 Fed. Reg. at 1900. These extraordinary claims reveal the dramatic conflict between the OCC's regulations and this Court's well-established presumptions in favor of state corporate regulation and the separate legal status of parent corporations and subsidiaries.

C. The Sixth Circuit's decision conflicts with a decision of the Tenth Circuit and fails to observe the limitations on judicial deference under the *Chevron* doctrine.

1. The Tenth Circuit correctly held that *Chevron* does not apply to preemptive rulings by federal agencies.

The *Chevron* doctrine should not be applied to federal agency rulings that claim to have preemptive effect. Whether a federal agency possesses statutory authority to issue a regulation that preempts state law is a legal question as to which the judicial branch has both superior expertise and an institutional responsibility to resolve sensitive issues regarding the allocation of federal and state power. As Justices Kennedy and O'Connor have observed, "the whole jurisprudence of pre-emption" is one of the important ways in which the judiciary "has participated in maintaining the federal balance" between national and state authority.[14]

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in [the statute] purports to reject this bedrock principle" of corporate separation).

[14] *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

This Court has never ruled definitively on the question of whether the *Chevron* doctrine applies to preemption determinations by federal agencies. In *Chevron* itself, the Supreme Court was not faced with any preemption issue and considered only the question of whether the federal agency's regulation represented a "reasonable construction" of the governing federal statute. 467 U.S. at 840. In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the petitioner contended that the presumption against preemption of state law "in effect trumps *Chevron*." *Id.* at 743. Therefore, the petitioner argued, a reviewing court may not defer to a federal agency's preemption determination, and the court instead must "make its own interpretation of [the federal statute] that will avoid (to the extent possible) pre-emption of state law." *Id.* at 743-44. After noting the petitioner's argument, this Court assumed, without deciding, that the question of a statute's preemptive effect "must always be decided *de novo* by the courts."[15]

The Tenth Circuit decided the issue left unresolved in *Smiley*. The Tenth Circuit declared that a federal agency's preemption determination is **not** entitled to deference under *Chevron*, because such a determination "involves matters of law – an area more within the expertise of the courts than within the expertise of the [agency].". *Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991). Thus, the Tenth Circuit's decision in *Harmon* squarely conflicts with the decisions of the Second, Sixth and Ninth Circuits, which granted *Chevron* deference to the OCC's preemptive regulation. To resolve this important conflict among the circuits, this Court should grant review in this case and also in *Burke*. In

[15] *Id.* at 743-44. Subsequently, in *Medtronic*, four members of this Court observed that "[i]t is not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference." *Medtronic*, 518 U.S. at 512 (O'Connor, J., concurring in part and dissenting in part).

addition, this Court should confirm that the presumption against preemption obliges the OCC to demonstrate that 12 C.F.R. § 7.4006 is consistent with "the clear and manifest purpose of Congress" – a burden that the OCC simply cannot meet.[16]

The OCC's self-interest in issuing preemptive rules provides a further compelling reason for rejecting the OCC's appeal for *Chevron* deference. Section 7.4006 is one of a long series of preemptive rules and opinions that the OCC has issued in recent years. In defending its preemptive rulings, the OCC has declared that preemption of state law is "a significant benefit of the national charter – a benefit that the OCC has fought hard over the years to preserve." The OCC's aggressive theory of preemption gives national banks a "major advantage" over state banks, because the OCC claims that national banks should be free "to conduct a multistate business subject to a single uniform set of federal laws, under the supervision of a single regulator, free from visitorial powers of various state authorities."[17]

The OCC has a powerful self-interest in persuading the largest banks to operate under national charters. Virtually all of the OCC's budget is funded by assessments paid by national banks, and the biggest national banks pay the highest assessments. In response to the OCC's aggressive preemption efforts, several large, multistate

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[16] *Medtronic*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). For evidence showing that 12 C.F.R. § 7.4006 is **not** consistent with the "clear and manifest purpose of Congress," *see* Pet. Cert. 8-9, 12-21, 26-30; Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Annual Review of Banking & Financial Law 225, 324-48, 357-63 (2004).

[17] Quotations in the preceding paragraph are from a speech by Comptroller of the Currency John D. Hawke, Jr. on Feb. 12, 2002, quoted in Wilmarth, *supra* note 16, at 236, 274.

banks have recently converted from state to national charters, thereby producing a significant increase in the OCC's assessment revenues.[18] Given the OCC's obvious financial and empire-building motives for issuing preemptive regulations, those rules should be disqualified from any consideration for *Chevron* deference.[19]

2. Even if *Chevron* applies to preemptive rules, 12 C.F.R. § 7.4006 is not entitled to deference.

Even if this Court determines that the *Chevron* doctrine may properly be applied in reviewing preemptive regulations, the Second, Sixth and Ninth Circuits plainly erred in granting deference to 12 C.F.R. § 7.4006. As explained above in Part I.A., the approach followed by all three courts would give the OCC an unlimited authority to issue regulations preempting state law **except** in areas where Congress has **affirmatively prohibited** such regulations by **unambiguous** statutory language. As shown by this Court's subsequent decision in *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), all three courts failed to understand the prerequisites for *Chevron* deference.

In *Gonzales*, this Court explained that "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative [agency] is involved." *Id.*

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[18] *See* Wilmarth, *supra* note 16, at 274-79, 289-93; Arthur E. Wilmarth, Jr., OCC v. Spitzer: *An Erroneous Application of* Chevron *That Should Be Reversed*, 86 BNA's Banking Report No. 8, Feb. 20, 2006, at 379, 387.

[19] *See* Wilmarth, *supra* note 16, at 232-33, 293-98; *see also* Timothy K. Amstrong, *Chevron Deference and Agency Self-Interest*, 13 Cornell Journal of Law & Public Policy 203, 208-23, 234-45, 261-73, 282-87 (2004); Cass R. Sunstein, *Chevron Step Zero*, 92 Virginia Law Review 187, 209-10 (2006) (agreeing that, under "Chevron Step Zero," *Chevron* should **not** apply "when an agency's self-interest is so conspicuously at stake that it is implausible to infer a congressional delegation of law-interpreting power").

at 916. Even if a statute is ambiguous, deference is appropriate under *Chevron* only if the federal agency's regulation is "promulgated pursuant to authority Congress has delegated to the [agency]." *Id.* Moreover, a reviewing court may properly refuse to defer to an agency's claim of "broad and unusual authority through an implicit delegation" based on "vague terms or ancillary provisions" in the governing statute. *Id.* at 921 (internal quotation marks and citation omitted). In such a case, the reviewing court may appropriately conclude that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2001)).

Thus, *Gonzales* makes clear that statutory silence or ambiguity is **not** a sufficient basis for granting deference to a federal agency's regulation under *Chevron*. Instead, a reviewing court must first carefully consider – as a precondition for applying *Chevron*'s two-step analysis – whether Congress has expressly or impliedly authorized the agency to adopt a regulation to clarify the ambiguity or to fill the "gap" that the agency has identified in the governing statute. Only if the court answers "yes" to this essential question may the court then apply *Chevron*'s two-step analysis to determine whether the agency's interpretation of the statute is entitled to deference.[20] *Gonzales* also cautions that when an agency issues a ruling that significantly expands its jurisdiction or encroaches upon an area traditionally regulated by the states, the reviewing court should be highly skeptical of

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[20] *See Gonzales*, 126 S. Ct. at 916-22, 925; *see also United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (explaining that deference under *Chevron* is proper only when it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law").

the agency's claim of implied authority unless the agency can show that its ruling is consistent with clear evidence of congressional intent.[21]

In *Gonzales*, this Court struck down an interpretive rule issued by the United States Attorney General. Under that rule, physicians prescribing controlled substances for assisted suicides were deemed to be engaged in an illegitimate medical practice and were subject to civil and criminal sanctions, notwithstanding their compliance with the law of the state in which they were licensed to practice. This Court determined that the federal Controlled Substances Act ("CSA") "manifests no intent to regulate the practice of medicine generally" and, instead, indicated a congressional purpose to "rely upon a functioning medical profession regulated under the States' police powers." 126 S. Ct. at 923. Accordingly, this Court invalidated the rule because (i) the Attorney General's claim of authority would "effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality", and (ii) the "text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it." *Id.* at 925.

The District of Columbia Circuit followed a similar approach in refusing to give *Chevron* deference to a ruling by the Federal Trade Commission ("FTC"). *Am. Bar Ass'n v. FTC*, 430 F.3d 457 (D.C. Cir. 2005). The FTC's ruling purported to classify attorneys as "financial institutions" for purposes of a federal banking statute that requires financial institutions to protect the privacy of their customers. The FTC's ruling would have enabled the agency to "extend its regulatory authority over attorneys engaged in the practice of law", even though "the regulation of the practice of law is traditionally the province of the states." *Id.* at 468, 471. In concluding that the FTC's ruling was

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[21] *See Gonzales*, 126 S. Ct. at 918, 921-22, 924-25.

not entitled to *Chevron* deference, the court held that "Congress has not made an intention to regulate the practice of law 'unmistakably clear' in the language of the [federal statute]", and "it is not reasonable for an agency to conclude that Congress has chosen such a course of action in language that is, even charitably viewed, at most ambiguous."[22]

The court also rejected the FTC's suggestion that a federal agency should be entitled to a highly deferential review under "step two" of *Chevron* in any case where the "[federal] statute does not expressly **negate** the existence of a claimed administrative power." The court declared that such an application of *Chevron* would be "flatly unfaithful to the principles of administrative law . . . and refuted by precedent. . . . Plainly, if we were to **presume** a delegation of power from the absence of an express **withholding** of such power, agencies would enjoy virtually limitless hegemony."[23]

Like the agency rulings in *Gonzales* and *ABA v. FTC*, 12 C.F.R. § 7.4006 represents a radical extension of federal agency authority into an area traditionally regulated by the states. As shown above, § 7.4006 ignores the legal separation between national banks and their state-chartered operating subsidiaries, and it preempts all state authority to regulate such subsidiaries. Yet the federal banking statutes do not manifest any clear indication of congressional intent to vest the OCC with exclusive authority over **state-chartered, non-bank corporations** that are controlled by national banks. In fact, those statutes define the term "national bank" to include **only federally-chartered depository institutions** that are eligible to become members of the Federal Reserve System and to receive federal deposit insurance. *See* 12 U.S.C.

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[22] *Id.* at 472, 473 (citations omitted).

[23] *Id.* at 468 (for both quotations, emphasis appears in the original, and internal quotation marks and citation are omitted).

§§ 21-24, 26-27, 221a(a), 282, 1813(a)(1), (c)(2) & (4), 1814-16. Thus, as Petitioner has shown, § 7.4006 is indefensible under either "step one" or "step two" of *Chevron*. *See* Pet. Cert. 8-21. In *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361 (1986), this Court struck down a similar regulation of the Federal Reserve Board, which attempted to redefine the term "bank" for purposes of the Bank Holding Company Act. This Court held that the "traditional deference courts pay to agency interpretation" did **not** allow the Board to expand the limits of its jurisdiction beyond the boundaries established by the "plain language of the statute." *Id.* at 368, 373-74. Section 7.4006 should be invalidated for the same reason.

II. The OCC's Rules Violate the Tenth Amendment by Infringing on the States' sovereign Authority to Regulate State-Chartered Corporations.

As shown above in Part I.A., 12 C.F.R. § 7.4006 bars the states from regulating state-chartered operating subsidiaries or from establishing any corporate governance rules for such subsidiaries that are inconsistent with the extensive federal rules governing national banks. Thus, the OCC's rule effectively "federalizes" state-chartered operating subsidiaries by placing them under the OCC's exclusive supervisory control. However, this Court has held that the federal government intrudes upon the states' sovereign authority and exceeds the boundaries established by the Tenth Amendment when it attempts to "convert [state-chartered corporations] into creatures of the federal government" without the permission of the chartering states. *Hopkins Federal Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 335 (1935). *See* Pet. Cert. 26-30. In an analogous case, this Court refused to give *Chevron* deference to a federal agency's interpretive rule, because the rule adopted an expansive definition of the agency's jurisdiction that created "significant constitutional and federalism questions." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S.

159, 174 (2001). This Court invalidated the rule, holding that it "alter[ed] the federal-state framework by permitting federal encroachment upon a traditional state power" without any "clear indication that Congress intended that result." *Id.* at 172-73. Based on the same canon in favor of avoiding serious constitutional questions, § 7.4006 should be denied any deference under *Chevron*, because the rule infringes upon the states' sovereign powers to regulate the activities and governance of state-chartered corporations without any clear evidence of supporting congressional intent.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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(13)

No. 05-1342

Supreme Court, U.S.
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In the Supreme Court of the United States

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Financial and Insurance Services,

Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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Petition for Certiorari filed April 18, 2006
Certiorari granted June 19, 2006

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General Docket
US Court of Appeals for the Sixth Circuit
Court of Appeals Docket #: 04-2257 Filed: 10/14/04
Nsuit: 3440 Civil Rights: Other
Wachovia Bank, et al v. Watters
Appeal from: Western District of Michigan at Lansing

- -

Case type information:
1) Civil
2) private
3) federal question

- -

Lower court information:

District: 0646-5 : 03-00105
Trial Judge: Robert Holmes Bell, Chief District Judge
Court Reporter: Kevin Gaugier
Date Filed: 7/21/03
Date order/judgment: 8/31/04
Date NOA filed: 9/24/04

- -

Fee status: paid

- -

Prior cases:
None
Current cases:
None

Docket as of June 26, 2006 9:17 pm

04-2257	Wachovia Bank, et al v. Watters
10/14/04	Civil Case Docketed. Notice filed by Appellant Linda A. Watters. Transcript needed: y (blc)

* * *

1/12/05	PROOF BRIEF filed by John C. Scherbarth for Appellant Linda A. Watters. Certificate of service date 1/10/05 Number of Pages: 39. [04-2257] (rgf)

* * *

1/13/05	MOVANT MOTION filed to allow Natl Assn Realtors & MI Assn Realtors to file an amicus curiae brief and for leave to file oversized brief. Motion filed by Gregory L. McClelland for Movant MI Assn Realtors, Movant Natl Assn Realtors. Certificate of service date 1/12/05 . [04-2257] (blc)
1/13/05	TENDERED : amicus brief of Natl Assn of Realtors and MI Assn of Realtors from Gregory L. McClelland for Movant MI Assn Realtors, Movant Natl Assn Realtors [04-2257] Motion for leave to file pending. (blc)

* * *

1/26/05	Corrected APPELLANT PROOF brief filed by John C. Scherbarth. Copies: 01. Certificate of Service date 1/24/05 [04-2257] (rgf)

* * *

2/10/05	BRIEF filed by Jessica Dvorak for Amicus Curiae IA, et al. Copies 06. Certificate of service date 2/9/05 . Number of Pages: 34. [04-2257] (blc)

* * *

3/18/05	PROOF BRIEF filed by Lori McAllister for Appellee Wachovia Mortgage, Appellee Wachovia Bank. Certificate of service date 3/16/05. Number of Pages: 58++. [04-2257] (rgf)

* * *

3/24/05	BRIEF filed by Douglas B. Jordan for Amicus Curiae Office of the Comptroller of the Currency. Copies 07. Certificate of service date. Number of Pages: 32. [04-2257] Supporting affirmance. (blc)
	* * *
3/24/05	MOVANT MOTION filed to allow Amer Comm Bankers, Consumer Mortgage Coalition, and Financial Serv Roundtable to file an amicus curiae brief supporting appellees. Motion filed by Frederick C. Schafrick for Movant Amer Comm Bank, et al. Certificate of service date 3/23/05. [04-2257] (blc)
3/24/05	TENDERED : amicus brief of Amer Comm Bankers, et al from Frederick C. Schafrick for Movant Financial Serv, Movant Consumer Mortage, Movant Amer Comm Bank [04-2257] Motion pending. (blc)
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4/15/05	FINAL BRIEF filed by John C. Scherbarth for Appellant Linda A. Watters. Copies: 07. Certificate of service date 4/12/05 Number of Pages: 39. [04-2257] (rgf)

* * *

4/18/05 FINAL REPLY BRIEF filed by John C. Scherbarth for Appellant Linda A. Watters. Copies: 07 Certificate of service date 4/14/05 Number of Pages: 18. [04-2257] (rgf)

* * *

4/29/05 FINAL BRIEF filed by Lori McAllister for Appellee Wachovia Mortgage, Appellee Wachovia Bank. Copies: 07. Certificate of service date 4/27/05. Number of Pages: 58+++. [04-2257] (rgf)

* * *

8/16/05 Oral argument date set for October 27, 2005 in court room 607. Notice of argument sent to counsel on 8/22/05. Notice of argument sent to counsel. [04-2257] (pjm)

* * *

9/2/05 ORDER filed granting motion of American Community of Bankers, Consumer Mortgage Coalition, and Financial Services Roundtable leave to file an amicus curiae brief supporting appellees [3139717-1] filed by Frederick C. Schafrick [04-2257] Entered by order of the court. (blc)

9/2/05 ORDER filed: The motion of the National Association of Realtors and Michigan Association of Realtors for leave to file an oversized amicus brief is denied. The movants may file a corrected brief within the page limitation. Entered by order of the court. (blc)

9/2/05 BRIEF filed by Frederick C. Schafrick for Amicus Curiae Financial Serv, Amicus Curiae Consumer Mortage, Amicus Curiae Amer Comm Bank. Copies 04. Certificate of service

date 3/23/05 (earlier tendered on 3/24/05). Number of Pages: 32. [04-2257] (blc)

* * *

9/15/05	BRIEF filed by Gregory L. McClelland for Amicus Curiae MI Assn Realtors, Amicus Curiae Natl Assn Realtors. Copies 07. Certificate of service date 9/14/05. Number of Pages: 15. [04-2257] See 9/2/05 order. (blc)
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10/27/05	CAUSE ARGUED on 10/27/05 by E. John Blanchard for Appellant Linda A. Watters, Lori McAllister for Appellee Wachovia Mortgage, Appellee Wachovia Bank before Judges Martin, Gibbons, Griffin. [04-2257] (kal)
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12/19/05	JUDGMENT: AFFIRMED. See opinion. (blc)
12/30/05	PETITION for rehearing before original panel filed by E. John Blanchard for Appellant Linda A. Watters. Certificate of service date 12/29/05. [04-2257] (blc)
1/18/06	ORDER filed denying petition for rehearing before original panel [3295513-1] filed by E. John Blanchard [04-2257]. Boyce F. Martin, Jr.,

	Julia S. Gibbons, Richard A. Griffin, Circuit Judges. (blc)
1/26/06	MANDATE ISSUED with no cost taxed [04-2257] (blc)
5/26/06	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Linda A. Watters. Filed in the Supreme Court on 04-18-06, Supreme Ct. case number: 05-1342. [04-2257] (swh)
6/26/06	U.S. Supreme Court letter filed granting petition for writ of certiorari [3382021-1] filed by Linda A. Watters Supreme Court No. 05-1342 [04-2257]. Filed in the Supreme Court on 06-19-06. (swh)

United States District Court
Western District of Michigan (Lansing)
CIVIL DOCKET FOR CASE #: 5:03-cv-00105-RHB
Wachovia Bank, N.A. et al v. Watters
Assigned to: Chief Judge Robert Holmes Bell
Cause: 42:1983 Other Civil Rights
Date Filed: 07/21/2003

* * *

DATE	#	DOCKET ENTRY
07/21/2003	1	COMPLAINT against Linda A. Watters filed by Wachovia Bank, N.A., Wachovia Mortgage Corporation (Attachments: # 1 Exhibit 1 # 2 Exhibit 2) (cmi) (Entered: 07/23/2003)
		* * *
08/29/2003	6	ANSWER to complaint by Linda A. Watters (gjf) (Entered: 09/02/2003)
		* * *
12/01/2003	15	MOTION for summary judgment by plaintiff Wachovia Bank, N.A., response due 12/29/2003; (Silsbury, Lori) (Entered: 12/01/2003)
12/01/2003	16	BRIEF in support of 15 *Oral Argument Requested* filed by Wacovia Bank, N.A. (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 5 # 5 Exhibit 4) (Silsbury, Lori) (Entered: 12/01/2003)
		* * *

12/02/2003	18	AFFIDAVIT OF RICHARD Z. GRIMM by plaintiffs Wachovia Bank, N.A. Wachovia Mortgage Corporation (Attachments: # 1 Exhibit A # 2 Exhibit B) (gjf) (Entered: 12/04/2003)
		* * *
01/30/2004	25	MOTION for amicus curiae status by amicus parties America's Community Bankers, American Bankers Association, Consumer Bankers Association, Consumer Mortgage Coalition, Electronic Financial Services Council, Financial Services Roundtable, The, Michigan Bankers Association (Attachments: # 1) (Permut, David) (Entered: 01/30/2004)
01/30/2004	26	MOTION for leave to file *amicus brief w/cert of svc* by amicus parties Mike Beebe, Richard Blumenthal, M. Jane Brady, Steve Carter, Patrick J. Crank, Charles J. Crist Jr., J. Joseph Curran Jr., W.A. Drew Edmondson, Charles C. Foti Jr., Terry Goddard, Christine O. Gregoire, Peter C. Harvey, Mike Hatch, Peter W. Heed, Jim Hood, Phill Kline, Peggy A. Lautenschlager, Bill Lockyer, Larry Long, Lisa Madigan, Patricia A. Madrid, Mike McGrath, Darrell V. McGraw Jr., Hardy Myers, Gerald J. Pappert, Jim Petro, William H. Pryor Jr., Mark Recktenwald, Thomas F. Reilly, Gregg D. Renkes, G. Steven Spagnoletti, Eliot Spitzer, Wayne Stenehjem, Gregory ~~D. Stu~~mbo, Paul Summers, Lawrence G. Wasden (Attachments: # 1 Proposed Document Brief of Amici

		Curiae of Attorney Generals) (gjf) (Entered: 02/02/2004)
01/30/2004	27	BRIEF by amicus Office of the Comptroller of the Currency re 15 . *w/oral argument requested* (Attachments # 1 Attachment Addendum) (gjf) (Entered: 02/02/2004)
		* * *
02/02/2004	29	ORDER re 25 granting motion for amicus curiae status (This entry replaces docket number 28); signed by Chief Judge Robert Holmes Bell (Chief Judge Robert Holmes Bell, ymc) (Entered: 02/02/2004)
02/02/2004	30	ORDER granting 26 motion for leave to file amicus brief; signed by Chief Judge Robert Holmes Bell (Chief Judge Robert Holmes Bell, ymc) (Entered: 02/02/2004
02/02/2004	31	BRIEF by amicus parties America's Community Bankers, American Bankers Association, Consumer Bankers Association, Consumer Mortgage Coalition, Electronic Financial Services Council, Financial Services Roundtable, The, Michigan Bankers Association re 15 (gjf) (Entered: 02/03/2004)
02/02/2004	32	BRIEF by amicus parties Mike Beebe Richard Blumenthal, M. Jane Brady, Steve Carter, Patrick J. Crank, Charles J. Crist Jr., J. Joseph Curran Jr., W.A. Drew Edmondson, Charles C. Foti, Jr., Terry Goddard, Christine O. Gregoire, Peter C. Harvey, Mike Hatch, Peter W.

Heed, Jim Hood, Phill Kline, Peggy A. Lautenschlager, Bill Lockyer, Larry Long, Lisa Madigan, Patricia A. Madrid, Mike McGrath, Darrell V. McGraw Jr., Hardy Myers, Gerald J. Pappert, Jim Petro, William H. Pryor Jr., Mark Recktenwald, Thomas F. Reilly, Gregg D. Renkes, G. Steven Rowe, Ken Salazar, Brian Sandoval, William H. Sorrell, Robert J. Spagnoletti, Eliot Spitzer, Wayne Stenehjem, Gregory D. Stumbo, Paul Summers, Lawrence G. Wasden re 15 (gjf) (Entered: 02/03/2004

* * *

02/19/2004	40	MOTION for leave to file *brief amicus curiae in support of the position of deft w/expedited consideration requested* by amicus parties Michigan Association of Realtors, National Association of Realtors (Attachments: # 1 Proposed Document brief Amicus Curiae) (gjf) (Entered: 02/20/2004)

* * *

02/20/2004	43	RESPONSE TO 32 *Amicus Brief of the Attorneys General* filed by plaintiffs Wachovia Bank, N.A., Wachovia Mortgage Corporation (Silsbury, Lori) (Entered: 02/20/2004)

* * *

02/20/2004	46	RESPONSE in opposition re 15 (*named as brief in opposition to pltfs' motion for summary judgment*) filed by Linda A. Watters (Attachments: # 1 Attachment 1

		# 2 Attachment 2 # 3 Attachment 3 # 4 Attachment 4) (gjf) (Entered 02/24/2004
		* * *
02/23/2004	45	ORDER denying 40 motion for leave to file amicus briefs; signed by Chief Judge Robert Holmes Bell (Chief Judge Robert Holmes Bell, ymc) (Entered: 02/23/2004
03/01/2004	48	REPLY to response to motion re 15 *Plaintiff's Reply Brief in Support of Their Motion for Summary Judgment* filed by Wachovia Bank, N.A. Wachovia Mortgage Corporation (Silsbury, Lori) (Entered: 03/01/2004)
		* * *
03/05/2004	52	MINUTES of motion hearing re 15 held before Chief Judge Robert Holmes Bell (Court Reporter Kevin Gaugier) (Chief Judge Robert Holmes Bell, ymc) (Entered: 03/30/2004)
03/11/2004	50	SUPPLEMENT re 46 (*named as supplemental attachments to brief in opposition to pltfs' motion for summary judgment*) by defendant Linda A. Watters (Attachments: # 1 Attachment 1 # 2 Attachment 2) (gjf) (Entered: 03/11/2004)
		* * *
08/30/2004	59	OPINION; signed by Chief Judge Robert Holmes Bell (Chief Judge Robert Holmes Bell, ymc) (Entered: 08/30/2004)
08/30/2004	60	ORDER granting in part and denying in

		part 15 motion for summary judgment; Plaintiff's claim for declaratory and injunctive relief is GRANTED and Plaintiff's claim under 42 U.S.C. 1983 is DENIED; signed by Chief Judge Robert Holmes Bell (Chief Judge Robert Holmes Bell, ymc) (Entered: 08/30/2004
08/31/2004	61	JUDGMENT in favor of Plaintiffs; signed by Chief Judge Robert Holmes Bell (Chief Judge Robert Holmes Bell, sdb) (Entered: 08/31/2004)
		* * *
09/24/2004	62	NOTICE OF APPEAL re 61 by defendant Linda A. Watters (mrs) (Entered: 09/27/2004)
		* * *
11/02/2004	66	TRANSCRIPT of Oral Argument Re: Plaintiffs' Motion for Summary Judgment held March 5, 2004 before Chief Judge Robert Holmes Bell (Court Reporter: Gaugier, Kevin (616)456-6133 (Entered: 11/02/2004)
12/21/2005	67	SLIP OPINION of USCA re appeal 62 (elc) (Entered: 12/23/2005)
12/21/2005	68	JUDGMENT of USCA re appeal 62 *judgment of the district court is affirmed* (elc) (Entered: 12/23/2005)
01/30/2006	69	MANDATE of USCA re appeal 68 (Entered: 02/02/2006)
06/08/2006	70	LETTER from Supreme Court of the

United States that a petition for writ of certiorari was filed on 4/18/06 and assigned case number 05-1342 re Notice of Appeal 62 (mrs) (Entered: 06/12/2006)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

WACHOVIA BANK, N.A., and
WACHOVIA MORTGAGE CORPORATION,

Plaintiffs,

v.

Civil Action No. 5:03-CV-0105
Hon. Robert Holmes Bell

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Insurance and Financial Services,

Defendant.

_____/

William J. Perrone (P27591)
Lori M. Silsbury (P39501)
Dykema Gossett PLLC
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_____/

COMPLAINT

1. This is a complaint for declaratory and injunctive relief to vindicate the rights of Plaintiff Wachovia Bank, N.A. and Wachovia Mortgage Corporation (collectively "Wachovia" or "Plaintiffs") to engage in the business of making first mortgage loans and secondary mortgage loans within the State of Michigan irrespective of restrictions imposed by Michigan state law and to be free from attempts by state regulators to interfere with the exclusive visitorial powers of the Office of the Comptroller of the Currency ("OCC"). Those state law restrictions: (1) are pre-empted by the National Bank Act and by regulations promulgated by the

OCC; and (2) violate 42 U.S.C. § 1983. This action is brought under the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, the National Bank Act and 42 U.S.C. § 1983.

Jurisdiction and Venue

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the action arises under the Constitution and laws of the United States, including the Supremacy Clause, the National Bank Act and Federal Regulations promulgated by the OCC. In addition, jurisdiction is proper under 28 U.S.C. § 1343(a)(3), in order to protect federal rights and immunities that are subject to deprivation under color of state law. This Court is authorized to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201-02.

3. Venue in this judicial district is proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to these claims occurred in this district.

The Parties

4. Plaintiff Wachovia Bank, N.A. ("Wachovia Bank") is a national banking association organized under the National Bank Act, which maintains its main office and principal place of business in North Carolina. Wachovia Mortgage Corporation ("Wachovia Mortgage") has been a wholly-owned operating subsidiary of Wachovia Bank since January 1, 2003, and is engaged in the business of making first mortgage loans and secondary mortgage loans in, among other places, the State of Michigan.

5. Defendant Linda A. Watters ("the Commissioner") is the Commissioner for the State of Michigan's Office of Financial and Insurance Services ("OFIS"). The Commissioner is the state official charged with enforcing the Mortgage Brokers, Lenders, and Servicers Licensing Act, Mich. Comp. Laws § 445.1651 *et seq*, and the

Secondary Mortgage Loan Act, Mich. Comp. Laws § 493.51 *et seq*, the state laws at issue in this case.

The Relevant Federal and State Statutes and Regulations

6. National banks are instrumentalities of federal law created and chartered under the National Bank Act, 12 U.S.C. § 21 *et seq*.

7. Pursuant to the National Bank Act, including 12 U.S.C. § 484, and federal regulations, the OCC has plenary regulatory authority over national banks, including their operating subsidiaries.

8. Pursuant to 12 C.F.R. § 5.34, national banks are authorized to establish operating subsidiaries. "A national bank may conduct in an operating subsidiary activities that are permissible for a national bank...." 12 C.F.R. § 5.34(e)(1). "An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank. If, upon examination, the OCC determines that the operating subsidiary is operating in violation of law, regulation, or written condition, or in an unsafe or unsound manner or otherwise threatens the safety or soundness of the bank, the OCC will direct the bank or operating subsidiary to take appropriate remedial action...." 12 C.F.R. § 5.34(e)(3).

9. Under 12 U.S.C. § 484 and 12 C.F.R. § 7.4000, the OCC has exclusive "visitorial" power over national banks and their operating subsidiaries except where federal law specifically provides otherwise. "Visitorial powers" include: "examination of a bank;" "inspection of a bank's books and records;" "regulation and supervision of activities authorized or permitted pursuant to federal banking law;" and "enforcing compliance with any applicable federal or state laws concerning those activities." 12 C.F.R. § 7.4000 (a)(2).

10. Pursuant to 12 C.F.R. § 7.4006, "[u]nless otherwise provided by federal law or OCC regulation, state laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."

11. Notwithstanding the exclusive authority of the OCC, the Commissioner has attempted to regulate Wachovia's mortgage lending business in Michigan and has attempted to exert visitorial authority over Wachovia.

12. The Mortgage Brokers, Lenders and Servicers Licensing Act (the "Licensing Act") requires that all persons engaged in the business of making first mortgage loans in Michigan be licensed or registered by the State and that they be subject to the Commissioner's visitorial powers.

13. Under Michigan law, a first mortgage lender is required to register with the Commissioner on a form prescribed by the Commissioner. Mich. Comp. Laws § 445.1656(1)(d).

14. Under Michigan law, the Commissioner also has the authority to audit and/or visit mortgage lending institutions registered in the State of Michigan. This authority is granted by Mich. Comp. Laws § 445.1661(2)(c), which states in pertinent part that the Commissioner has the authority "to conduct examinations and investigations of any person as necessary for the efficient enforcement of this act and the rules promulgated under this act."

15. Michigan law further requires that all persons engaged in the business of making secondary mortgage loans in Michigan be registered with OFIS and that they be subject to the Commissioner's visitorial powers pursuant to the Secondary Mortgage Loan Act, Mich. Comp. Laws § 493.51 *et seq.*

16. Section 2 of the Secondary Mortgage Loan Act states in relevant part that "[a] person shall not act as a broker,

lender, or servicer without first obtaining a license or registration as provided by this act." Mich. Comp. Laws § 493.52(1).

17. The Secondary Mortgage Loan Act defines a "secondary mortgage loan" as follows:

> "Secondary mortgage loan" means a loan that is not to be repaid within 90 days, that is made to a person for personal, family, or household purposes, and that is secured by a mortgage upon an interest in real property used as a dwelling if the property is subject to a lien of 1 or more prior mortgages. The loan may be secured by other collateral in addition to real property. Notwithstanding the place of execution, nominal or real, of a secondary mortgage loan, if the real property that secures the loan is located in this state, the secondary mortgage loan is subject to this act and all other applicable laws of this state.
>
> Mich. Comp. Laws § 493.51(2)(n).

18. The Commissioner has the authority to audit and/or visit secondary mortgage lending institutions registered with the State of Michigan. This authority is granted by Mich. Comp. Laws § 493.56b which states, in pertinent part, that the Commissioner may "conduct examinations and investigations of any person, as necessary to enforce this act and the rules promulgated under this act."

The Controversy Between the Commissioner and the Plaintiffs

19. The OCC has opined that it has exclusive visitorial authority over national banks and their subsidiaries, and that the OCC's exclusive visitorial authority precludes states from examining or requiring information from national

banks or their subsidiaries. The OCC's opinion supports the position that Wachovia Mortgage, as an operating subsidiary of a national bank, is subject to the OCC's exclusive visitorial authority and is exempt from Michigan state registration requirements. See Interpretive Letter #958 from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency (January 27, 2003).

20. First Union Mortgage Corporation became registered to engage in the business of making first mortgage loans under the Licensing Act on March 27, 1997, and changed its name to Wachovia Mortgage Corporation on February 4, 2002. Wachovia Mortgage Corporation remained continuously registered until it became a wholly-owned operating subsidiary of a national bank effective January 1, 2003. Wachovia Mortgage began making secondary mortgage loans in Michigan after July 1, 2003.

21. Relying on the pre-emptive authority of federal law, as identified by the OCC, Richard Z. Grimm, Vice President and Compliance Officer of Wachovia Mortgage, by letter dated April 3, 2003, notified the Commissioner's office that it was no longer subject to the requirements of the Michigan Licensing Act as a result of becoming a direct operating subsidiary of Wachovia Bank effective January 1, 2003. A copy of this letter is attached as Exhibit 1.

22. By letter dated June 23, 2003, Mark W. Weigold of the Commissioner's office acknowledged the nonrenewal and cancellation of the mortgage registration of Wachovia Mortgage, but stated that as of July 1, 2003, Wachovia Mortgage was no longer authorized to conduct mortgage lending activities in the State of Michigan. A copy of this letter is attached as Exhibit 2. The letter was not received by Wachovia until June 30, 2003.

23. Based on the letter dated June 23, 2003, the Commissioner maintains that Wachovia is required to be registered in the State of Michigan in order to lawfully engage

in the business of making mortgage loans in the State of Michigan. On information and belief, the Commissioner intends to exert visitorial authority and conduct audits on first and secondary mortgage lenders registered in the State of Michigan, and intends to regulate Wachovia's first and secondary mortgage lending business and may issue a cease and desist order in the event that Wachovia attempts to operate its first and secondary mortgage lending business in Michigan without Michigan registrations.

24. Wachovia disagrees with these positions and maintains, consistent with the views of the OCC, that it is not required to be licensed in order to engage in the business of making first or secondary mortgage loans in the State of Michigan and that the Commissioner has no visitorial power over Wachovia.

25. In light of the events described above, an actual controversy exists between Wachovia and the Commissioner concerning the validity of the Licensing Act and the Secondary Mortgage Loan Act as applied to Wachovia, a national bank engaged in the business of making first and secondary mortgage loans through its wholly-owned subsidiaries in the State of Michigan, and over whether the Commissioner has visitorial power over Wachovia.

26. As a result of the Commissioner's position, including the threatened enforcement of the Licensing Act and/or the Secondary Mortgage Loan Act to prohibit Wachovia from conducting its mortgage lending business in Michigan, Wachovia has been and will be irreparably harmed. Wachovia is caught between its federal regulator which, by law exercises exclusive visitorial powers, and the Commissioner, who continues to assert visitorial powers as evidenced by the June 23, 2003 letter to Wachovia Mortgage. Michigan's registration requirements require Wachovia to pay annual registration fees to the State of Michigan. During 2002 and 2003, Wachovia Mortgage paid or will pay $7,172.00 in registration fees to the State of Michigan. Wachovia will be unable to recover this

money in this Court once paid because of the State of Michigan's sovereign immunity and immunity under the Eleventh Amendment. These payments, therefore, constitute economic harm for which Wachovia has no remedy in federal court. Moreover, to the extent Wachovia is forced to comply unnecessarily with Michigan's regulatory regime, including the exercise of visitorial powers, it will have no remedy at law. Any action by the Commissioner to enforce the provisions of the Licensing Act or the Secondary Mortgage Loan Act, therefore, will subject Wachovia to irreparable harm.

Claims for Relief

Count I—Declaratory and Injunctive Relief on Preemption Grounds

27. Wachovia incorporates and realleges each and every allegation contained in paragraphs 1 through 26 of this Complaint as though fully set forth herein.

28. Michigan's Licensing Act and Secondary Mortgage Loan Act conflict directly with federal laws and regulations insofar as the Michigan statutes impair Wachovia's ability to engage in the business of making first and secondary mortgage loans in the State of Michigan.

29. Michigan's Licensing Act and Secondary Mortgage Loan Act, which grant to the Commissioner visitorial power and audit authority over mortgage lending institutions registered in the State of Michigan, conflict directly with federal laws and regulations insofar as the Michigan statutes impair Wachovia's ability to engage in the business of making first and secondary mortgage loans in the State of Michigan and interfere with the OCC's exclusive visitorial powers.

30. The provisions in Michigan's Licensing Act and Secondary Mortgage Loan Act which grant the Commissioner authority to commence an action in Ingham County Circuit

Court and to issue cease and desist orders, conflict directly with the exclusive enforcement authority granted to the OCC under federal laws and regulations, insofar as the Michigan statutes threaten to impair Wachovia's ability to engage in the business of making mortgage loans in the State of Michigan.

Count II-- 42 U.S.C. § 1983

31. Wachovia incorporates and realleges each and every allegation contained in paragraphs 1 through 30 of this Complaint as though fully set forth herein.

32. By virtue of the National Bank Act, federal regulations promulgated by the OCC and the plenary authority of the OCC, Wachovia is immune from the state registration requirement and regulation by the Commissioner. By attempting to regulate Wachovia's mortgage lending business in the State of Michigan, by requiring registration, and by exercising visitorial authority, the Commissioner is interfering with the rights and immunities of Wachovia under federal law and regulations.

33. Michigan's Licensing Act and the Secondary Mortgage Loan Act violate 42 U.S.C. § 1983 insofar as they interfere with the federally-granted rights and immunities of Wachovia to engage in the business of making first mortgage loans and secondary mortgage loans in the State of Michigan.

34. The provisions in Michigan's Licensing Act and Secondary Mortgage Loan Act violate 42 U.S.C. § 1983 insofar as they authorize the Commissioner to interfere with and intrude upon the federally-granted rights and immunities of Wachovia to be free from state enforcement proceedings and to be subjected exclusively to the enforcement authority of the OCC.

Prayer for Relief

WHEREFORE, Plaintiffs pray that this Court:

(A) issue preliminary and permanent injunctions prohibiting the Commissioner and her agents from:

(1) requiring that Wachovia Mortgage maintain a Michigan registration to make first mortgage loans pursuant to Michigan's Licensing Act;

(2) requiring that Wachovia Mortgage maintain a Michigan registration to make secondary mortgage loans pursuant to Michigan's Secondary Mortgage Loan Act;

(3) conducting any enforcement proceedings or taking any other action to enforce Michigan's Licensing Act or Secondary Mortgage Loan Act against Wachovia and its wholly-owned operating subsidiaries engaged in the business of making first mortgage loans and secondary mortgage loans in Michigan;

(4) conducting audits and/or visits or taking any other action to enforce Michigan's Licensing Act and/or Secondary Mortgage Loan Act on Wachovia, a national bank, and its wholly owned operating subsidiaries engaged in the business of making first and secondary mortgage loans in Michigan and thereby intruding on the OCC's exclusive visitorial powers;

(B) enter a judgment declaring that:

(1) Michigan's Licensing Act and Secondary Mortgage Loan Act are pre-empted insofar as they apply to Wachovia, a national bank, and its wholly owned operating subsidiary, Wachovia Mortgage, engaged in the business of making first and secondary mortgage loans in Michigan;

(2) Michigan's Licensing Act and Secondary Mortgage Loan Act are pre-empted insofar as they grant the Commissioner authority to conduct enforcement proceedings against Wachovia, a national bank, and its wholly owned operating subsidiary Wachovia Mortgage, engaged in the

business of making first and secondary mortgage loans in Michigan;

(3) Michigan's Licensing Act and Secondary Mortgage Loan Act are pre-empted insofar as they grant the Commissioner the authority to audit and/or visit Wachovia, a national bank, and its wholly owned operating subsidiary Wachovia Mortgage, engaged in the business of making first and secondary mortgage loans in Michigan and insofar as they intrude on the OCC's exclusive visitorial powers;

(C) award Wachovia its reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and

(D) grant Wachovia such other and further relief, including costs, as the Court may deem just and proper.

The undersigned hereby consents to electronic service in the above-captioned matter.

Respectfully submitted by,

DYKEMA GOSSETT PLLC

By: /s Lori M. Silsbury
Lori M. Silsbury (P39501)
William J. Perrone (P27591
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Dated: July 21, 2003

achovia
ortgage
›rporation

Wachovia Mortgage Corporation
PO Box 900001
Raleigh, NC 27675-9001

1100 Corporate Center Drive
Raleigh NC 27607-5066

April 3, 2003

Mr. Frances K. Wallace
Chief Deputy Commissioner
Financial Institutions Bureau
611 W. Ottawa St.
Lansing, MI 48909-0220

RE: Registration Certificate #: FR0601

Dear Mr. Wallace:

Wachovia Mortgage Corporation ("WMC") presently holds the above-referenced registration certificate under the Michigan Mortgage Brokers, Lenders, and Servicers Licensing Act. Effective January 1, 2003, WMC became a wholly owned operating subsidiary of Wachovia Bank, N.A. Effective with that date, WMC will engage in mortgage lending and servicing activities, as well as certain other lending activities, as authorized by regulations of the Office of the Comptroller of the Currency ("OCC").

As you are aware, operating subsidiaries of national banks are regularly examined and monitored by the OTS and are generally consolidated and treated as a unit with the parent national bank for federal statutory and regulatory puruposes. 12 C.F.R. Section 5.34(e)(3) and (4). Unless otherwise specified by federal law or OCC regulations, state laws apply

to an operating subsidiary only to the extent that the state law would apply to the parent national bank. 12 C.F.R. Section 7.0004. Accordingly, state law, including the obligation to be licensed or registered, applies to an operating subsidiary only to the extent that it applies to the parent national bank.

The courts and OCC have long taken the position that national banks need not be licensed to carry out activities authorized by federal law. *See Bank of America Nat. Trust and Sav. Ass'n v. Lima*, 103 F. Supp. 916 (D. Mass. 1952) and cases cited therein. See also OCC Interpretive Letter dated March 24, 1994 (mortgage lender registration and fee provisions of Georgia law preempted by federal law). CCH Fed. Banking L. Rep. ¶ 83553 (1994 transfer binder)

This extension of the federal preemption applicable to federally chartered institutions to their operating subsidiaries has been recognized and approved by several courts.

EXHIBIT 1

April 3, 2003
Page 2

See, e.g., WFS Financial Inc. v. Dean, 79 F. Supp. 2d 1024 (W.D. Wis. 1999); *Chaires v. Chevy Chase Bank, F.S.B.*, 748 A.2d 34 (Md. Ct. Spec. App.), *cert. denied* 359 Md. 334 (2000).

The courts and the OCC have clearly stated that state licensing laws do not apply to national banks. As such, state laws imposing licensing or registration requirements on national banks or otherwise regulating certain mortgage lending practices of national banks are preempted. This preemption exists whether or not the state recognizes the preemption through an exemption in its licensing statute.

As previously noted, the OCC has extended this same preemption to operating subsidiaries of national banks. As a

result, state laws that impose licensing or registration requirements on the lending activities of a national bank operating subsidiary are preempted.

Currently, WMC is registered under the Mortgage Brokers, Lenders, and Servicers Licensing Act in accordance with the Mich. Comp. Laws Ann. § 445.1651 et. seq. Under federal preemption, these registration requirements would not apply to a national bank and therefore cannot be applied to an operating subsidiary of a national bank.

Please be assured that, notwithstanding our change in status, WMC will continue to be fully responsive to your office regarding inquiries from any of our borrowers or potential borrowers. Please continue to forward customer complaints to my attention as follows: Richard Z. Grimm, Vice President/Compliance Officer, 1100 Corporate Center Drive/NC-4755, Raleigh, NC 27607. If you have any questions regarding this matter, please contact me at 919-852-6777.

Very truly yours,

/s Richard Z. Grimm

Richard Z. Grimm
Vice President/Compliance Officer

cc: Debra Warren, President/CEO
Brian J. Evans, Senior Vice President

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

WACHOVIA BANK, N.A. and
WACHOVIA MORTGAGE CORPORATION,

Plaintiffs,

v

Civil Action No. 5:03CV0105

LINDA A. WATTERS, in her official capacity as
Commissioner of the Michigan Office of
Insurance and Financial Services,

Hon. Robert Holmes Bell

Defendant.

_____/

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Insurance & Banking Division
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_____/

ANSWER TO COMPLAINT

Defendant, Linda A. Watters, Commissioner of the Michigan Office of Financial and Insurance Services, by her attorneys, Michael A. Cox, Attorney General of Michigan, and John C. Scherbarth, Assistant Attorney General, answers the Complaint as follows:

1. In answer to the allegations in the second sentence of paragraph 1 of the Complaint, Defendant denies that Michigan state law restrictions are preempted by the National Bank Act and regulations promulgated by the OCC, and further denies that Michigan state law applicable to the regulation of businesses engaged in making first and second mortgage loans violates 42 USC § 1983. The remainder of paragraph 1 is merely a description of Plaintiffs' action. Defendant admits that this court has jurisdiction to address the case or controversy presented by Plaintiffs. However, Defendant denies the implication that any of Plaintiffs' federal rights and immunities have been deprived under color of state law.

2. The allegations of paragraph 2 are admitted.

3. The allegations of paragraph 3 are admitted.

4. The allegations of paragraph 4 are admitted, except that Wachovia Mortgage Corporation has never been registered in Michigan to make secondary mortgages.

5. The allegations of paragraph 5 are admitted. In further response, Wachovia Mortgage Corporation has never been licensed or registered under the Secondary Mortgage Loan Act, MCL 493.51 *et seq*.

6. The allegations of paragraph 6 are admitted.

7. The allegations of paragraph 7 are admitted as to national banks, but denied as to operating subsidiaries.

8. In response to paragraph 8, Defendant admits that the quoted excerpt is from the cited authority.

9. In response to paragraph 9, Defendant admits that the quoted excerpt is from the cited authority.

10. In response to paragraph 10, Defendant admits that the quoted excerpt is from the cited authority.

11. In response to paragraph 11, Defendant admits that she has regulated Wachovia Mortgage Corporation because Wachovia Mortgage Corporation registered with the State of Michigan, state law require registration, and registration pursuant to the Mortgage Brokers, Lenders, Services Licensing Act (MBLSLA), MCL 445.1651 *et seq*. is not preempted by federal law. A registrant such as Wachovia Mortgage Corporation is subject to regulatory oversight by the Commissioner which is significantly reduced from regulations applicable to mortgage licensees. Section 6(2) of the MBLSLA specifically exempts a registrant from Sections 3 (License or renewal application), 4 (Proof of financial responsibility) and 5 (Minimum net worth). Section 6(3) of the MBLSLA exempts a registrant from Sections 29(1)(b) or (c) (Certain prohibited conduct). A registrant such as Wachovia Mortgage Corporation that is a subsidiary of a federally chartered depository financial institution is subject to investigation by the Commissioner upon the receipt of a complaint, but only if the complaint is not being adequately pursued by the appropriate federal regulatory agency, in this case, the OCC. Section 13(2) of the MBLSLA. Defendant denies that she has attempted to exert authority over Wachovia Bank, N.A., and further denies the implication that the OCC has exclusive authority over Wachovia Mortgage Corporation's mortgage lending business in Michigan.

12. The allegations of paragraph 12 are denied for the reason that the Mortgage Brokers, Lenders & Services Licensing Act, MCL 445.1651 *et seq*, provides exemptions to certain persons engaged in the business of making first

mortgage loans in Michigan. Further, the MBLSLA does not describe the Commissioners powers as "visitorial" which is a term used in the National Bank Act. Instead, the MBLSLA sets forth the Commissioner's authority over a registrant, subject to the exemptions described in paragraph 11 above.

13. In response to paragraph 13, to the extent a first mortgage lender is required to register with the Commissioner, Defendant admits that the registration is required to be on a form prescribed by the Commissioner.

14. The allegations of the first sentence of paragraph 14 are admitted, but only to the extent and under the conditions set forth in Section 13(2) of the MBLSLA discussed in paragraph 11 above. In further response to paragraph 14, Defendant admits that the quoted excerpt is from the cited authority.

15. The allegations of paragraph 15 are denied for the reason that the Secondary Mortgage Loan Act, MCL 493.51 *et seq*, provides exemption from registration set forth in MCL 493.52. In further response, the Secondary Mortgage Loan Act (SMLA), MCL § 493.51 *et seq*. does not describe the Commissioner's powers as "visitorial" which is a term used in the National Bank Act. The specific powers of the Commissioner are set forth in § 6b of the SMLA, MCL § 493.56b.

16. In response to paragraph 16, Defendant admits that the quoted excerpt is from the cited authority.

17. In response to paragraph 17, Defendant admits that the quoted excerpt is from the cited authority.

18. In response to paragraph 18, Defendant admits that the quoted excerpt is from the cited authority.

19. As to the allegations of paragraph 19, Defendant admits that the OCC issued the cited interpretive letter but denies it is a correct interpretation of the law. As to the remaining

allegations of paragraph 19, the interpretive letter speaks for itself. In further response, Defendant denies the conclusion of the interpretive letter by the OCC that a state-chartered corporation operating within a state is exempt from that state's registration requirements.

20. The allegations of the first sentence of paragraph 20 are admitted. The allegations of the second sentence of paragraph 20 are denied because Wachovia Mortgage Corporation did not provide notification of its desire to surrender its Michigan registration to Defendant until April 14, 2003. Accordingly, Wachovia Mortgage Corporation was registered pursuant to Michigan law until at least April 14, 2003. Wachovia Mortgage Corporation did not and has not returned its original registration to Defendant, which is required for surrender of a registration in Michigan. MCL 405.1660(1). Defendant is without sufficient information to reply to the allegations in the third sentence of paragraph 20.

21. The allegations of paragraph 21 are admitted to the extent that the identified letter dated April 3, 2003 was received by Defendant on April 14, 2003. Defendant neither admits nor denies the asserted motivation for submittal of the letter.

22. The allegations of paragraph 22 are admitted, except that Defendant is unable to confirm the date the letter was received by Wachovia.

23. The allegations of the first sentence of paragraph 23 are admitted as to Wachovia Mortgage Corporation and denied as to Wachovia Bank, N.A. The allegations of the second sentence of paragraph 23 as to Wachovia Mortgage Corporation pertaining to "visitorial" authority are denied for the reasons discussed above in paragraph 12. The allegations of the second sentence of paragraph 23 as to Wachovia Mortgage Corporation pertaining to audits is denied because a registrant under the MBLSLA is not subject to annual examination. Section 6(2) of the MBLSLA. The Defendant

admits that she intends to regulate Wachovia Mortgage Corporation's first and secondary mortgage lending business to the extent authorized by Michigan law, which is subject to the limitations from regulation discussed above. Defendant denies that she intends to regulate Wachovia Bank, N.A.

24. In response to paragraph 24, Defendant neither admits nor denies Wachovia's statement of its position. In further response, Defendant asserts that Wachovia Mortgage Corporation is required to be registered in order to engage in the business of making first or secondary mortgage loans in Michigan, not to be licensed as alleged by Plaintiffs.

25. The allegations of paragraph 25 are admitted as to Wachovia Mortgage Corporation except as to the use of the term "visitorial powers" as discussed in paragraph 12 above. The allegations of paragraph 25 are denied as to Wachovia Bank, N.A. for the reason that Wachovia Bank, N.A. and Wachovia Mortgage Corporation are separate and distinct legal entities. Defendant does not assert that the Mortgage Brokers, Lenders & Services Licensing Act and the Secondary Mortgage Loan Act apply to Wachovia Bank, N.A.

26. The allegations of paragraph 26, to the extent the allegations allege irreparable harm, are denied for the reason that Wachovia Mortgage Corporation will face no irreparable harm from continuing to be regulated by the state of Michigan. Defendant denies the allegation that the federal regulator exercises exclusive visitorial powers over Wachovia Mortgage Corporation for the reason that the federal regulator has incorrectly interpreted the National Bank Act as applied to an operating subsidiary of a national bank. While the Commissioner's authority over Wachovia Mortgage Corporation described above is not described as "visitorial", the Commissioner does assert jurisdiction over Wachovia Mortgage Corporation to the extent discussed above in paragraphs 11, 12, 15, and 23. Defendant admits that the federal regulator asserts exclusive visitorial powers. Defendant admits that Wachovia Mortgage Corporation paid $3,540 to the

state of Michigan in registration fees for the year 2002 and is required to pay $3,632 as a renewal fee for 2003 in registration fees, for a total of $7,172. Defendant admits that the state of Michigan has sovereign immunity and immunity under the Eleventh Amendment of the United States Constitution.

27. In response to paragraph 27, Defendant incorporates and realleges each and every response contained in paragraphs 1-26 of this answer.

28. The allegations of paragraph 28 are denied as to Wachovia Bank, N.A. for the reason that the cited state statutes do not apply to a national bank. The allegations of paragraph 28 are denied as to Wachovia Mortgage Corporation for the reason that Wachovia Mortgage Corporation has engaged in the business of making first mortgage loans in the state of Michigan under Michigan law and may continue to do so upon compliance with Michigan law. Thus, Wachovia Mortgage Corporation's ability to engage in the business of making first and secondary mortgage loans in the state of Michigan is not impaired. Defendant denies that there is a conflict between federal laws and regulations and Michigan state laws regulating the business of making first and secondary mortgage loans. Defendant admits that the OCC has interpreted federal law in such a way as to create a conflict between federal and state law.

29. The allegations of paragraph 29 are denied as they pertain to Wachovia Bank, N.A. for the reason that Michigan's Mortgage Brokers, Lenders & Services Licensing Act and Secondary Mortgage Loan Act do not apply to a national bank. The allegations of paragraph 29 are denied as to Wachovia Mortgage Corporation for the reasons set forth in response to paragraph 28 above. In further response, Defendant denies that the OCC has exclusive powers over Wachovia Mortgage Corporation.

30. The allegations of paragraph 30 are denied as they pertain to Wachovia Bank, N.A. for the reason that Michigan's

Mortgage Brokers, Lenders & Services Licensing Act and Secondary Mortgage Loan Act do not apply to a national bank. The allegations of paragraph 30 are admitted as to Wachovia Mortgage Corporation to the extent of the characterization of the Commissioner's authority. The allegations of paragraph 30 pertaining to an alleged conflict with exclusive enforcement authority granted to the OCC is denied for the reason that the OCC does not have exclusive enforcement authority over Wachovia Mortgage Corporation to the extent it is conducting its mortgage lending activities in the state of Michigan. Defendant denies that Michigan statutes impair Wachovia Mortgage Corporation's ability to engage in the business of making mortgage loans in the state of Michigan for the reason that they facilitate the ability of Wachovia Mortgage Corporation to engage in such a business. Wachovia Mortgage Corporation has successfully engaged in the business of making mortgage loans in Michigan since its initial registration with the Michigan Office of Financial and Insurance Services in 1997.

31. In response to paragraph 31, Defendant incorporates and realleges each and every response contained in paragraphs 1-30 of this answer.

32. The allegations of the first sentence of paragraph 32 are admitted as to Wachovia Bank, N.A., but are denied as to Wachovia Mortgage Corporation. The allegations of the second sentence of paragraph 32 are denied as to Wachovia Bank, N.A., because the Defendant requires no registration and does not exercise authority over a national bank pursuant to either the MBLSLA or the SMLA. The allegations of the second sentence of paragraph 32 as to Wachovia Mortgage Corporation are denied.

33. The allegations of paragraph 33 are denied.

34. The allegations of paragraph 34 are denied.

AFFIRMATIVE DEFENSES

1. Plaintiffs fail to state a claim for which relief may be granted because the Tenth Amendment to the United States Constitution reserves to the states those powers not delegated to the United States by the Constitution, nor prohibited by it to the states.

2. Plaintiff Wachovia Bank, N.A. lacks standing to assert the claims set forth in the Complaint because Defendant is not asserting any regulatory authority over Wachovia Bank, N.A.

3. To the extent, if any, that Plaintiffs are seeking relief other than prospective relief, this court lacks jurisdiction under the Eleventh Amendment of the United States Constitution.

4. Plaintiffs fail to state a claim for which relief may be granted because the OCC's regulations that OCC claims preempt state authority over operating subsidiaries are contrary to Congressional intent regarding the scope of preemption under the National Bank Act.

5. Plaintiffs fail to state a claim for which relief may be granted under 42 USC § 1983 because a claim of preemption is not based on an alleged deprivation of a federal right within the meaning of 42 USC § 1983.

6. Plaintiffs fail to state a claim for which relief may be granted because the National Bank Act does not, nor was it Congress's intent to preempt state regulation of state-chartered

subsidiaries of nationally-chartered banks such as Wachovia Mortgage Corporation.

Respectfully submitted

Michael A. Cox
Attorney General

John C. Scherbarth (P28865)
Assistant Attorney General
Insurance & Banking Division
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1160

Dated: August 29, 2003

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

WACHOVIA BANK, N.A., and
WACHOVIA MORTGAGE CORPORATION,

Plaintiffs,

Civil Action No. 5:03-CV-0105

v.

Hon. Robert Holmes Bell

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Insurance and Financial Services,

Defendant.
_____/

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

***

B. Undisputed Material Facts

Only a few facts are material to the dispositive legal issues in this action. They are:

- Plaintiff, Wachovia Bank, is a national banking association chartered under the National Bank Act.

- Wachovia Bank wholly owns its operating subsidiary, Wachovia Mortgage.
- Wachovia Bank, through Wachovia Mortgage, engages in mortgage lending in Michigan.

- The plaintiffs maintain that they are subject to the exclusive visitorial authority of the OCC and that, because of federal preemption of Michigan state registration requirements as applied to national banks and their operating subsidiaries, they are not required to maintain state registrations to engage in mortgage lending.

- Notwithstanding federal law, the defendant, the Commissioner of OFIS intends to enforce state laws under which Wachovia Mortgage must maintain state registrations to engage in first and secondary mortgage lending in Michigan and under which the Commissioner has visitorial and enforcement authority over Wachovia Mortgage for mortgage lending activity in Michigan.

None of these material facts are disputed.[1]

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[1] Summary disposition is appropriate pursuant to Fed. R. Civ. P. 56(c) when no genuine issues of material facts are in dispute.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

WACHOVIA BANK, N.A., and
WACHOVIA MORTGAGE CORPORATION,

Plaintiffs,

Civil Action No. 5:03-CV-0105

v.

Hon. Robert Holmes Bell

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Insurance and Financial Services,

Defendant.
_____/

AFFIDAVIT OF RICHARD Z. GRIMM

State of North Carolina)
)ss
County of Wake)

Richard Z. Grimm, being duly sworn, deposes and states:

1. I am a Vice President and Compliance Manager for Wachovia Mortgage Corporation. I have personal knowledge of the facts set forth herein and am competent to so testify.

2. Wachovia Bank, N.A. is a national banking association chartered under the National Bank Act, 12 U.S.C. § 21 *et seq*.

3. Wachovia Mortgage Corporation, previously named First Union Mortgage Corporation, originally registered to engage in the business of making first mortgage loans in Michigan on March 27, 1997. Wachovia Mortgage Corporation ("Wachovia Mortgage") is organized under the laws of North Carolina.

4. On January 1, 2003, Wachovia Mortgage became a wholly owned operating subsidiary of Wachovia Bank, and is engaged in the business of making first mortgage loans in, among other places, the State of Michigan. After July 1, 2003, Wachovia Mortgage also began to engage in the business of making secondary mortgage loans in Michigan.

5. As a wholly operating subsidiary of Wachnovia Bank, N.A., Wachovia Mortgage is authorized to originate mortgage loans in all 50 states, plus the District of Columbia.

6. By letter dated April 3, 2003, I advised the State of Michigan that I was surrendering Wachovia Mortgage's first mortgage lending registration for Michigan. A copy of this letter is attached as Exhibit A. I also stated that, effective January 1, 2003, Wachovia Mortgage became a direct operating subsidiary of Wachovia Bank, and accordingly, on that date Wachovia Mortgage would become exempt from registration under the laws of Michigan.

7. The Michigan Office of Financial and Insurance Services responded by letter dated June 23, 2003 signed by Mark W. Weigold. Mr. Weigold's letter is attached as Exhibit B.

Further affiant sayeth not.

/s Richard Z. Grimm
Richard Z. Grimm

Sworn to before me this
1st day of December, 2003.

/s Terry L. Fox
Notary Public
My commission expires 12/13/03

achovia
ortgage
rporation

Wachovia Mortgage Corporation
PO Box 900001
Raleigh, NC 27675-9001

1100 Corporate Center Drive
Raleigh NC 27607-5066

April 14, 2003

Mr. Allan Huber
Senior Review Specialist
Financial Institutions Bureau
611 W. Ottawa St., Floor 2
Lansing, MI 48933

Re: Annual Report – Registration Certificate #: FR0601

Dear Mr. Huber:

Wachovia Mortgage Corporation ("WMC") provided notice to the Financial Institutions Bureau on April 3, 2003, that we are no longer registered under the Michigan Brokers, Lenders, and Servicers Licensing Act. Effective January 1, 2003, WMC became a wholly owned operating subsidiary of Wachovia Bank, N.A. Effective with that date, WMC is regulated by the Office of the Comptroller of the Currency ("OCC").

Enclosed is our final annual report of 2002 activity. As we are not renewing our registration, it is our understanding that no operating fee will be assessed under MCL § 445.1658(3)(b).

If you have any questions regarding this matter, please contact me at 919-852-6777.

Very truly yours,

/s Richard Z. Grimm

Richard Z. Grimm
Vice President/Compliance Officer

cc: Brian J. Evans, Senior Vice President

Exhibit 1-A

FIS 1077 (01/03) Michigan Office of Financial & Insurance Services

Authorized by PA 173 of 1987, as amended. Required for supervisory purposes and the establishment of the annual operating fee.

DATE DUE – March 3, 2003

Mortgage Brokers, Lenders, and Servicers Annual Report for the Year Ended December 31, 2002

WARNING: Failure to file this annual report will result in commencement of administrative action against the license or registration.

File the original report. All questions refer only to loans brokered, originated, or serviced under the Mortgage Brokers, Lenders, and Servicers Licensing Act, Public Act 173 of 1987, as amended.

FULL NAME OF LICENSEE OR REGISTRANT	LICENSE OR REGISTRATION NO
Wachovia Mortgage Corporation	FR 601

CERTIFICATION

I hereby certify that I have read and knowingly made the following statements and representations and that each and every such statement and representation is true, accurate and complete to the best of my knowledge and belief. I understand that any false statement, misrepresentation, or fraud in connection with this report may be cause for revocation, suspension, or other disciplinary action, against the company's mortgage broker, lender, or servicer license or registration.

Date: 4/14/03 Signature /s Richard Z. Grimm

Title Vice President/Compliance Officer

1. Fiscal year-end of the licensee/registrant:_____

2. List the name, title, mailing address, phone number, and facsimile number of theperson to whom correspondence regarding the license/registration should be sent.

Name: Richard Z. Grimm

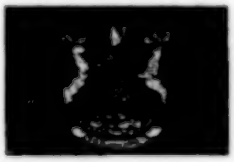
Title: Vice President/Compliance Officer

Business Phone No.: 919-852-6777

Facsimile Number: 919-852-7210

Mailing Address: 1100 Corporate Center Drive/NC-4755

Raleigh, NC 27607-5066



JENNIFER M. GRANHOLM GOVERNOR	STATE OF MICHIGAN OFFICE OF FINANCIAL AND INSURANCE SERVICES DEPARTMENT OF CONSUMER & INDUSTRY SERVICES DAVID C. HOLLISTER, DIRECTOR	LINDA A. WATTERS COMMISSIONER

June 23, 2003

Richard Z. Grimm, VP
Wachovia Mortgage Corporation
1100 Corporate Center Drive
Raleigh, NH 27607-5066

Dear Mr. Grimm:

This letter is to acknowledge the non-renewal and cancellation of the mortgage registration (no. FR-0601) issued in the name of Wachovia Mortgage Corporation under the Mortgage Brokers, Lenders, and Servicers Licensing Act.

Mortgage registration number FR-0601 will be made inactive as of July 1, 2003 pursuant to your written request (letter received April 14, 2003). Please return original registration number FR-0601 to our office.

Please be advised that Wachovia Mortgage Corporation will not be registered pursuant to the Mortgage Brokers, Lenders, and Servicers Licensing Act as of July 1, 2003. Therefore, Wachovia Mortgage Corporation will not be authorized to conduct activities that require licensure or registration pursuant to the Mortgage Brokers, Lenders, and Servicers Licensing Act as of July 1, 2003.

Section 2(1) of the Mortgage Brokers, Lenders, and Servicers Licensing Act states:

"A person shall not act as a mortgage broker, mortgage lender, or mortgage servicer without irst obtaining a license or registering under this act, unless 1 or more of the following apply: (a) The person is solely performing services as an employee of only 1 mortgage broker, mortgage lender, or mortgage servicer."

Finally, Wachovia Mortgage Corporation is to review its records and verify that it has filed all required documents

(annual reports, financial statements, license renewals, etc.) and paid all outstanding fees and invoices. Failure to file a required document or to pay an outstanding fee or invoice will be considered in the future filing of license or registration applications by Wachovia Mortgage Corporation or affiliations of Wachovia Mortgage Corporation.

Exhibit 1-B

Richard Z. Grimm, VP
Wachovia Mortgage Corporation
June 23, 2003
Page 2

If you have any questions concerning this letter, please contact me at (517) 373-3460.

Sincerely,

/s Mark W. Weigold

Mark W. Weigold, Manager
Qualifications Assessment Unit

cc: Allan Huber
Conduct Review Division

Supreme Court of the United States

No. 05-1342

Linda A. Watters, Commissioner, Michigan Office of Insurance and Financial Services
Petitioner

v.

Wachovia Bank, N.A., et al.
Respondent

ON PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit, No. 04-2257.

ON CONSIDERATION of the petition for a writ of certiorari herein to the United States Court of Appeals for the Sixth Circuit.

IT IS ORDERED by this Court that the said petition is granted.

Justice Thomas took no part in the consideration or decision of this petition.

June 19, 2006

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court of the
United States
By_____
Deputy

141A

(12)

No. 05-1342

FILED
SEP - 1
OFFICE OF THE CLERK

In the Supreme Court of the United States

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Financial and Insurance Services,

Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONER

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Solicitor General
Counsel of Record
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Lansing, Michigan 48909
(517) 373-1124

E. John Blanchard
Assistant Attorney General
Attorneys for Petitioner

QUESTIONS PRESENTED

1. 12 USC § 484(a) of the National Bank Act limits visitorial powers over "national banks" except as authorized by federal law. National banks are defined and created under the National Bank Act. State-chartered nonbank operating subsidiaries of national banks are created under State corporate law. The Comptroller of the Currency, by Rule 12 CFR 7.4006, made 12 USC § 484(a) equally applicable to State-chartered nonbank operating subsidiaries of national banks. Is the interpretation of the Comptroller of the Currency that 12 CFR 7.4006 preempts Michigan's laws regulating mortgage lending as applied to State-chartered nonbank operating subsidiaries, entitled to judicial deference under *Chevron USA, Inc v Natural Resources Defense Council*?

2. A national bank has been declared to be a national corporation. 12 CFR 7.4006 treats a State-chartered nonbank operating subsidiary of a national bank as equivalent to a national bank and, thus, as a national corporation. The Tenth Amendment to the United States Constitution is violated to the extent a statute permits the conversion of State corporations into federal ones in contravention of the laws of the State of their creation. State laws protecting citizens against abusive mortgage practices is an exercise of the States' police power. Does 12 CFR 7.4006, by equating a State-chartered nonbank operating subsidiary with a national bank for purposes of federal preemption of State regulation, intrude on State sovereignty in violation of the Tenth Amendment to the United States Constitution?

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A. Section 484(a) preempts State authority only with respect to "national banks," not entities—such as Wachovia Mortgage—that are not "national banks." 12

1. The National Bank Act expressly defines "national banks," the only entity covered by § 484(a), to exclude their operating subsidiaries. 12

2. The OCC's reading of § 484(a) conflicts with the fundamental corporate law

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OPINIONS BELOW

The December 19, 2005, opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Wachovia Bank N.A. v Watters*, 431 F3d 556, and is reprinted in the Appendix to the Petition for Writ of Certiorari at 1a-12a. The Court of Appeals denied rehearing in an unpublished order dated January 18, 2006, and is reprinted in the Appendix to the Petition for Writ of Certiorari at 28a.

The opinion of the United States District Court, Western District of Michigan, Southern Division is reported at *Wachovia Bank, N.A. v Watters*, 334 F Supp 2d 957, and is reprinted in the Appendix to the Petition for Writ of Certiorari at 14a-25a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 19, 2005. An order denying petition for rehearing was entered January 18, 2006. This Court has jurisdiction pursuant to 28 USC § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

US Const, Art VI, § 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

US Const, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

12 USC § 484(a) of the National Bank Act provides:

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

12 USC § 24 (Seventh) provides (in pertinent part):

> Upon duly making and filing articles of association and an organization certificate the [a national banking] association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking.

12 CFR 7.4006 provides:

> Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.

Relevant portions of the Business Corporation Act, MCL 450.1101 et seq; the Mortgage Brokers, Lenders, and Servicers Licensing Act (MBLSLA), MCL 445.1651 et seq.; and the

Secondary Mortgage Loan Act (SMLA), MCL 493.51 et seq. are attached as a statutory appendix to this brief.

STATEMENT OF THE CASE

A. Federal and State Regulation of National Banks

1. Congress first authorized the chartering of national banks in 1863, when it enacted the National Currency Act,[1] which was amended and reenacted in 1864 and renamed the National Bank Act.[2] The Act's primary purpose was to address pressing federal revenue needs by replacing notes issued by individual State-chartered banks with a new national currency that would be tied to the purchase of federal bonds.[3] To promote public trust in the new currency that national banks were empowered to issue, the Act vested the Comptroller of the Currency with supervisory authority over national banks to ensure their financial soundness.[4] Under 12 USC § 484(a) of the Act, unless otherwise authorized by federal law, only the Comptroller, the courts and congressional authorities may exercise visitorial powers over a "national bank."

2. The National Bank Act did not divest *all* State authority to regulate national banks. From its earliest decisions involving the NBA, this Court has recognized and upheld the applicability of State laws to national banks in numerous cases. In 1870, the Court rejected a bank's preemption challenge to a State's collection of a bank shares tax, declaring that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. . . . It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. . . ."[5] Numerous other Court decisions, most

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[1] National Currency Act, ch 58, 12 Stat 665 (1863) (repealed 1864).

[2] National Bank Act, ch 106, 13 Stat 99 (1864).

[3] Cong Globe, 37th Cong, 3d Sess 840-43 (1863).

[4] Act of June 3, 1864, ch 106, §§ 1, 17, 54, 13 Stat at 99, 104, 166.

[5] *National Bank v Commonwealth*, 76 US 353, 361-62 (1870).

recently *Atherton v FDIC*,[6] reaffirmed the principle that national banks remain subject to many State laws.[7]

Congress ratified this longstanding practice of State regulation of national banks in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub L No 103-328, 108 Stat 2338 (1994), which legalized interstate branching for the first time in U.S. history. The Act, among other things, expressly obligates the Office of the Comptroller of the Currency (OCC) to enforce national bank branches' compliance with *State* consumer protection and fair lending laws,[8] while leaving untouched States' continued power to enforce their laws against national banks. In passing the Act, Congress clearly recognized States' power to regulate national banks. As explained in the Conference Committee Report, "States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. . . . Under well-established judicial principles, national banks are subject to State law in many significant respects."[9] The

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[6] *Atherton v FDIC*, 519 US 213, 222-23 (1997).

[7] *See e.g., Davis v Elmira Savings Bank*, 161 US 275, 290 (1896) ("Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating State laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purpose of Congressional legislation."); *First National Bank in St. Louis v Missouri*, 263 US 640, 656 (1924) (National banks "are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States."); *Anderson National Bank v Luckett*, 321 US 233, 244-54 (1944) ("National banks are subject to State laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions."); *Barnett Bank of Marion County, N.A., v Nelson*, 517 US 25, 33 (1996) (affirming that States have "the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers").

[8] 12 USC § 36(f)(1)(A)-(B).

[9] HR REP No 103-651, at 53 (1994) (Conf Rep), *reprinted in* 1994 USCCAN 2068, 2074.

Conference Report continued, "Courts generally use a rule of construction that avoids finding a conflict between the Federal and State law where possible. The Interstate Banking and Branching Efficiency Act of 1994 does not change these judicially established principles."[10]

3. Title 12 USC § 24(Seventh) provides that national banks may exercise "all such incidental powers as shall be necessary to carry out the business of banking." In 1966, pursuant to that provision, the OCC adopted a regulation, presently codified at 12 CFR 5.34, authorizing national banks to establish operating subsidiaries. The OCC recognized in 1966 that operating subsidiaries are "controlled subsidiary corporations" used for the purpose, *inter alia*, of "separating particular operations of the [parent] bank from other operations."[11] But the OCC did not suggest, expressly or implicitly, that States would no longer be able to regulate State-chartered nonbank operating subsidiaries of national banks.

The OCC changed its position 35 years later, in 2001, when it adopted 12 CFR 7.4006. A year earlier, the OCC promulgated 12 CFR 5.34(e)(3), which provides that an operating subsidiary engages in activities "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." Section 5.34(e)(3) does not contain any statement of an intent to preempt State laws, and in adopting the rule the OCC did not describe it as having preemptive effect.[12] But the OCC then asserted such preemptive effect with the adoption of 12 CFR 7.4006, which states that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." In adopting 12 CFR 7.4006, the OCC expressed its view that operating subsidiaries are "the equivalent of departments or divisions of their parent

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[10] *Id.*

[11] 31 Fed Reg 11,459, 11,460 (1966).

[12] *See* 65 Fed Reg 12,905, 12,909 (2000).

banks."[13] Accordingly, the OCC now asserts that 12 USC § 484(a)—which gives the OCC exclusive visitorial powers over "national banks"—extends to State-chartered, nonbank operating subsidiaries of national banks, thereby preempting state laws regulating them.

The OCC has issued parallel regulations (12 CFR 34.1(b) and 34.4) purporting to extend 12 USC § 371(a), which authorizes national banks to make real estate loans. The regulations expressly provide that State licensing requirements do not apply to State-chartered operating subsidiaries, and provide that many other State laws otherwise applicable to operating subsidiaries are preempted as well.

B. Michigan's Regulatory Framework

Linda A. Watters is the Commissioner of the Michigan Office of Financial and Insurance Services (OFIS). In that capacity, she administers and enforces both Michigan's Mortgage Brokers, Lenders, and Servicers Licensing Act (MBLSLA)[14] and the Secondary Mortgage Loan Act (SMLA).[15] Commissioner Watters exercises general supervision and control over mortgage brokers, mortgage lenders, and mortgage servicers doing business in Michigan.[16] The MBLSLA and the SMLA exempt depository financial institutions from regulation.[17] However, mortgage brokers, mortgage lenders, and mortgage servicers which are subsidiaries of depository financial institutions are required to register with the OFIS if the depository financial institution does not maintain a main office or a branch office in the State of Michigan.[18]

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[13] 66 Fed Reg 34,784, 34,788 (2001).

[14] MCL 445.1651 *et seq*, Statutory Appendix, p 6.

[15] MCL 493.51 *et seq*, Statutory Appendix, p 27.

[16] MCL 445.1661, Statutory Appendix, p 10.

[17] MCL 445.1675(a), Statutory Appendix, p 19.

[18] MCL 445.1675(m), Statutory Appendix, p 21.

The MBLSLA and SMLA give authority to the Commissioner of OFIS to protect consumers from unfair, unsound, and abusive mortgage lending practices. The MBLSLA was passed in 1987 in response to mortgage fraud and unscrupulous predatory lending abuses that came to light in a scandal involving Diamond Mortgage Company and A.J. Obie and Associates, two firms under the same ownership. Losses to over 1600 investors totaled roughly $50 million. Borrowers lost an incalculable sum in the form of clouded titles and exorbitant fees. In a subsequent criminal prosecution stemming from this scandal, the Michigan Court of Appeals called it "the largest reported 'Ponzi' scheme in the history of this state."[19]

Under the MBLSLA, if a person is convicted of a felony involving "fraud, dishonesty, or breach of trust," the commissioner may suspend or prohibit that person from being licensed or registered.[20] It is a violation of the act for a licensee or registrant to "engage in fraud, deceit, or material misrepresentation in connection with any transaction governed by the act."[21] Likewise, a licensee or registrant under the Secondary Mortgage Loan Act may be suspended, revoked or denied by the Commissioner if she finds that the "licensee or registrant or an owner, officer, member, partner, stockholder, employee, or agent" has "engaged in fraud, deceit, or material misrepresentation in connection with any transaction" under the act.[22]

Certain violations of the MBLSLA and the SMLA constitute crimes punishable by fines and imprisonment.[23] In addition, under both the MBLSLA and the SMLA, the Michigan Attorney General is given substantial enforcement powers, including taking

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[19] *People v Greenberg*, 176 Mich App 296, 299; 439 NW2d 336 (1989).

[20] MCL 445.1668a(8), Statutory Appendix, p 15.

[21] MCL 445.1672(b), Statutory Appendix, p 18.

[22] MCL 493.61(2)(b), Statutory Appendix, p 29-30.

[23] MCL 445.1668d; MCL 493.64d, Statutory Appendix, pp 17, 31; MCL 445.1679; MCL 493.77(2), Statutory Appendix, pp 22, 32;

appropriate legal action to enjoin wrongdoing or prosecute violations,[24] and bringing actions to collect actual damages[25] and civil fines.[26] Further, the SMLA recognizes the unique role of the Attorney General by providing that the powers and duties of the Attorney General granted by the act are in addition to the Attorney General's statutory and common law authority, and are not impaired or restricted under any other statute or common law.[27]

State authority over nonbank operating subsidiaries of national banks is specifically limited. Under the MBLSLA, a registrant like Wachovia Mortgage, unlike a licensee, is exempt from (1) the license application process and extensive background investigation of its officers, directors, shareholders, partners, and affiliates; (2) proof of financial responsibility; (3) minimum net worth requirements; (4) annual examination by the OFIS Commissioner; and (5) complaint investigations, unless the complaint is not being adequately pursued by the appropriate federal regulatory authority. Wachovia Mortgage, as a subsidiary of a depository institution, is also not subject to certain requirements regarding the transfer and assigning of mortgages.[28]

C. Michigan's Regulatory Framework As Applied to Respondents

Wachovia Bank, N.A. (Wachovia Bank) is a national bank as defined in federal statutes,[29] whose main office is located in Charlotte, North Carolina. Wachovia Bank has no physical presence in the State of Michigan. It has no branch offices in

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[24] MCL 445.1661(2)(d); MCL 493.56b(2)(d), Statutory Appendix, pp 10, 27.

[25] MCL 445.1681(1)(a)-(c); MCL 493.77(4), Statutory Appendix, pp 25, 33.

[26] MCL 445.1679(3); MCL 493.77(3), Statutory Appendix, pp 25, 33.

[27] MCL 493.81, Statutory Appendix, p 33.

[28] MCL 445.1656(2) and (3); MCL 445.1653-445.1655; MCL 445.1679(1)(b) and (c); MCL 445.1663(2).

[29] See 12 USC §§ 21-27, 221, 221a, 282, 1813(c)(2), 1814-16.

Michigan, in contrast to the branch offices it has in some 17 other States throughout the country.

Wachovia Mortgage Corporation (Wachovia Mortgage) is a State-chartered, nonbank, operating subsidiary of Wachovia Bank. It is a corporation organized under the laws of the State of North Carolina. Wachovia Mortgage enjoys a separate and distinct corporate status from its parent, Wachovia Bank. Wachovia Mortgage is not a depository institution, has no federal banking charter, and is not eligible to become a Federal Reserve member Bank or to obtain federal deposit insurance.

Wachovia Mortgage holds a Certificate of Authority from the Michigan Corporation Division to transact business as a Foreign Profit Corporation in Michigan under Michigan's Business Corporation Act.[30] Foreign nonbank corporations, like Wachovia Mortgage, must be granted a Certificate of Authority by Michigan before transacting business.[31] Wachovia Mortgage (along with its predecessor corporations) has filed Michigan Annual Reports for Foreign Profit Corporations with the Michigan Corporation Division since 1984. Michigan's Business Corporation Act does not apply to banking corporations and Wachovia Mortgage has never asserted an exemption or characterized itself as a "bank" in its filings with Michigan Corporation Division.[32]

From March 27, 1997 to January 1, 2003, Wachovia Mortgage (previously named First Union Mortgage Corporation) also had "registered" in Michigan to engage in the business of making first mortgage loans under the MBLSLA. Under the MBLSLA, Wachovia Mortgage is not required to be "licensed." Rather, as a subsidiary of a depository institution (Wachovia Bank), Wachovia Mortgage is exempt from licensure and need only "register" with the Commissioner of OFIS. Wachovia Mortgage must submit a financial statement within 90 days of its

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[30] MCL 450.1101 *et seq.*

[31] MCL 450.2011, MCL 450.2015.

[32] MCL 450.1123(2).

fiscal year end[33]; it must pay an annual operating fee for renewal of registration[34]; it is required to submit an annual report[35]; and it is required to maintain documents for examination but is not subject to annual examination.

By letter dated April 3, 2003, Wachovia Mortgage notified OFIS that on January 1, 2003, Wachovia Mortgage—which had been a wholly-owned subsidiary of Wachovia Corporation, a financial holding company which also owned Wachovia Bank—had become an operating subsidiary corporation of Wachovia Bank. Wachovia Mortgage declared in that letter that it would henceforth engage in its mortgage lending and servicing activities in Michigan "as authorized by regulations of the OCC." In claiming exemption from State regulation, Wachovia Mortgage asserted that "[Michigan's] registration requirements would not apply to a national bank and therefore cannot be applied to an operating subsidiary of a national bank."

By letter dated June 23, 2003, OFIS notified Wachovia Mortgage that without a registration pursuant to MBLSLA, it would no longer be authorized to conduct its mortgage broker, lender and servicer activities in Michigan as of July 1, 2003, the date of expiration. After July 1, 2003, Wachovia Mortgage began to engage in the business of making secondary mortgage loans in Michigan.

D. Course of the Proceedings

Respondents Wachovia Bank and Wachovia Mortgage filed a Complaint in the United States District Court, Western District of Michigan, Southern Division, seeking declaratory and injunctive relief prohibiting the Commissioner Watters from enforcing Michigan's mortgage laws against Wachovia Mortgage. They contended that Michigan's mortgage laws as applied to Wachovia

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[33] MCL 445.1657(2).

[34] MCL 445.1657(1) and MCL 445.1658(3)(b).

[35] MCL 445.1671(3).

Mortgage were preempted by the National Bank Act and regulations promulgated by the OCC when Wachovia Mortgage became an operating subsidiary of Wachovia Bank, a national bank. They also alleged that Michigan's regulatory attempts violated 42 USC § 1983.

Michigan countered that the National Bank Act does not grant authority to the OCC to preempt State law through an administrative regulation granting to State-chartered nonbank operating subsidiaries all of the immunities from State oversight available to federally-chartered national banks. Michigan also asserted that the National Bank Act, as construed by the OCC, violates the Tenth Amendment to the United States Constitution.

In response to Respondents' summary judgment motion, the district court issued an opinion finding that the limitation on visitorial power over national banks contained in 12 USC § 484(a) was "extended" by 12 CFR 7.4006 to State-chartered nonbank operating subsidiaries of national banks, and that the OCC's rule was entitled to deference under *Chevron USA, Inc v National Resources Defense Council*.[36]

The Court of Appeals affirmed, holding that the district court appropriately conducted its analysis pursuant to *Chevron*, that "Congress has not spoken precisely on the issue," and that the regulations were within the OCC's authority and were a reasonable interpretation of 12 USC § 484(a).[37] The Court of Appeals also summarily rejected Michigan's argument that, as to State-chartered nonbank operating subsidiaries like Wachovia Mortgage, 12 CFR 7.4006 violated the Tenth Amendment.

As a result, Michigan's MBLSLA and SMLA were declared preempted by 12 USC § 484(a) and 12 CFR 7.4006, and

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[36] *Chevron USA, Inc v National Resources Defense Council*, 467 US 837 (1984).

[37] Pet. App. 8a, 10a.

Michigan was permanently enjoined from enforcing its State laws against Wachovia Mortgage.

SUMMARY OF ARGUMENT

12 USC § 484(a) of the National Bank Act limits visitorial powers over "national banks" except as authorized by federal law. However, the OCC, by Rule 12 CFR 7.4006, made 12 USC § 484(a) equally applicable to State-chartered nonbank operating subsidiary corporations of national banks, preempting State regulatory power over them. This preemptive rule of the OCC is not entitled not to any deference under *Chevron* or traditional rules of statutory construction, nor does it preempt State law.

1. 12 USC § 484(a) of the National Bank Act clearly and unambiguously applies only to national banks. The statute must be enforced according to its terms. There is a presumption against preemption and traditional rules of statutory construction, as well as *Chevron*, call for this threshold determination to be made without any deference to an agency's interpretation. The authority of Congress to preempt State laws is an extraordinary power, presenting significant legal questions falling within the expertise of the courts. This determination should be made by the Court *de novo* without deference to the agency's interpretation of statutes and regulations.

2. In the absence of Congressional authorization, the OCC has no independent power to preempt the validly enacted legislation of a sovereign State by a regulation. Congress has not authorized the OCC to do so in this instance. The OCC is therefore without authority to "extend" through a regulation its preemptive reach to State-chartered nonbank operating subsidiary corporations of national banks.

3. 12 CFR 7.4006 is not entitled to *Chevron* deference because Congress has "directly spoken to the precise question." The National Bank Act does not give the OCC authority to preempt State regulation of State-chartered nonbank operating

subsidiaries of national banks. The preemptive effect of a regulation is a legal question for determination by courts, not federal agencies. The agency's interpretation should be viewed with skepticism because it expands the agency's jurisdiction and affects the federal-State balance and would effectively reverse the presumption against preemption so that statutory ambiguity means preemption

4. 12 CFR 7.4006 ignores fundamental concepts of State corporate law. Wachovia Bank, a national corporation created under federal law, and Wachovia Mortgage, a State-chartered corporation created under State law, are separate and distinct legal entities. Congress is presumed to act against the background of the total *corpus juris* of the States. Accordingly, this Court has repeatedly upheld principles of corporate separation absent a clear command by Congress to disregard those principles.

5. 12 CFR 7.4006 intrudes on State sovereignty in violation of the Tenth Amendment to the United States Constitution. The practical effect of the regulation is to transform State-chartered operating subsidiaries into "creatures of the federal government" without the permission of the chartering States and put them beyond the reach of those States in which the corporation does business. States have a substantial interest in protecting their citizens against abusive mortgage lending practices by State-chartered corporations. In the absence of a lawful and unmistakably clear delegation of authority from Congress, federal administrative agencies have no power to infringe on a State's Tenth Amendment rights to regulate state-chartered corporations.

ARGUMENT

I. The OCC regulations providing that 12 USC § 484(a) preempts State authority with respect to nonbank operating subsidiaries of national banks misconstrue the statute and therefore are not entitled to judicial deference.

A. Section 484(a) preempts State authority only with respect to "national banks," not entities—such as Wachovia Mortgage—that are not "national banks."

1. The National Bank Act expressly defines "national banks," the only entity covered by § 484(a), to exclude their operating subsidiaries.

a. "The starting point in discerning Congressional intent is the existing statutory text."[38] The statutory anchor upon which this controversy rests is 12 USC § 484(a), which provides that "no *national bank* shall be subject to any visitorial powers except as authorized by federal law" or as vested in the "courts of justice" and congressional authorities (emphasis added). Visitorial powers include the examination and inspection of a national bank's books and records, as well as the enforcement of laws applicable to a national bank's operations.[39] The OCC, by adopting 12 CFR 7.4006, has purported to extend the exclusive visitorial powers it has over national banks to the State-chartered nonbank operating subsidiaries of national banks. The plain language of § 484(a) does not permit such an extension; the term "national bank" has a defined meaning that does not encompass nonbank operating subsidiaries such as Wachovia Mortgage.

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[38] *Lamie v United States Trustee*, 540 US 526, 534 (2004).

[39] *See, e.g., Guthrie v Harkness*, 199 US 148, 157-59 (1905); *First Union National Bank v Burke*, 48 F Supp 2d 132, 143-46 (D Conn 1999).

By its express terms, 12 USC § 484(a) applies only to "national banks." And in the National Bank Act, Congress declared that a "national bank" (1) is a depository institution that has applied for and received a charter from the OCC to conduct the business of banking, (2) is eligible to become a Federal Reserve member bank, and (3) is eligible to obtain federal deposit insurance from the Federal Deposit Insurance Corporation (FDIC).[40]

A "national bank" cannot come into existence without complying with the provisions of the national bank laws. Not only does it owe its existence to these laws, but it also is specifically governed by them in all aspects, including its corporate powers.[41] A nonbank operating subsidiary chartered by a State government is not a national bank. It is neither created pursuant to the national bank laws nor is it governed by these laws for purposes of corporate governance. It does not need a certificate from the OCC to conduct business, and it cannot become a member of the Federal Reserve System or obtain federal deposit insurance from the FDIC. Wachovia Mortgage satisfies none of the statutory indicia of national banks.

Rather than being a national bank, an operating subsidiary such as Wachovia Mortgage is an "affiliate" of a national bank. Immediately following the definition of "national bank" in 12 USC § 221a(a), the National Bank Act defines the term "affiliate" in § 221a(b) to include "any corporation" controlled by a national bank. This statutory definition of "affiliate" clearly includes operating subsidiaries of national banks, because they are corporations controlled by national banks.[42] Under traditional rules of statutory construction, it must be presumed that Congress's omission of any reference to affiliates or subsidiaries in 12 USC § 484(a) means that Congress did not intend to extend

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[40] 12 USC §§ 21-24, 26, 27, 221, 221a, 282, 501a, 1814 and 1815.

[41] 12 USC § 24 .

[42] See 12 CFR 5.34(e)(2).

the preemptive scope of that statute to reach nonbank operating subsidiaries.[43]

Moreover, other provisions of the National Bank Act do address both "national banks" and "affiliates." Under 12 USC §§161(c) and 481, the OCC may obtain reports from and examine "affiliates" in order to disclose fully "the relations between such affiliate and such bank." By contrast, § 484(a) limits the exercise of State powers only with respect to "national banks" and does not mention "affiliates." Congress is presumed to have acted purposefully when it omits language in one statutory provision that is included in another.[44]

The OCC first adopted its rule allowing national banks to establish operating subsidiaries in 1966. Congress has therefore had 40 years to amend 12 USC § 484 to bring "affiliates" within its scope—including two instances in the 1980's when it amended § 484.[45] Congress has chosen not to amend § 484, and therefore has retained the careful distinction between national banks and their affiliates, including operating subsidiaries that carry on particular aspects of the banking business.[46]

Section 484(a)'s limitation to "national banks" is dispositive, a conclusion supported by this Court's decision in *Board of Governors of the Federal Reserve System v Dimension Financial Corp.*[47] In that case, the Court struck down a regulation of the Federal Reserve Board ("FRB") that sought to redefine the statutory definition of "bank" set forth in the Bank Holding

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[43] *See Keene Corp v United States*, 508 US 200, 208 (1993).

[44] *City of Chicago v Environmental Defense Fund*, 511 US 328, 338 (1994).

[45] Congress amended § 484 in 1982 (PL 97-320, § 412, 96 Stat 1521) and again most recently on January 12, 1983 by PL 97-457, § 23a, 96 Stat 2510.

[46] See also S Rep No 77, 73d Cong, 1st Sess 10 (1933) (declaring that Congress intended "[t]o separate as far as possible national . . . banks from affiliates of all kinds").

[47] *Board of Governors of the Federal Reserve System v Dimension Financial Corp*, 474 US 361 (1986).

Company Act ("BHC Act"). The FRB argued that "nonbank banks" were functionally equivalent to "banks," just as the Respondents here claim that State-chartered nonbank operating subsidiaries are functionally equivalent to their parent national bank. In *Dimension Financial* the FRB contended that its redefinition of "bank" was necessary to accomplish the "plain purpose" of the BHC Act, just as Respondents suggest here that the OCC's redefinition of "national bank" in 12 CFR 7.4006 is necessary to carry out principles of the National Bank Act. In *Dimension Financial*, however, this Court held that a federal agency has no authority to expand the limits of its authority by altering a jurisdictional term set forth in the governing statute, regardless of how strongly the agency believes in its policy arguments.[48] Likewise, in *Board of Governors v Investment Company Institute*,[49] this Court held that 12 USC § 24 (Seventh), by its terms, applies only to banks, while "[o]rganizations affiliated with banks are dealt with by other sections of the Act."

This same reasoning applies to 12 CFR 34.1(b) and 12 CFR 34.4 to the extent they attempt to extend 12 USC § 371(a) to State-chartered nonbank operating subsidiaries. Section 371(a) provides that a "national banking association" may make real estate loans subject to the interagency real estate lending standards adopted by the federal banking agencies under 12 USC § 1828(*o*), and "such restrictions and requirements as the [OCC] may prescribe by regulation or order." Section 1828(*o*) and the interagency lending standards adopted thereunder apply only to national banks and other depository institutions insured by the FDIC. Thus, like 12 USC § 484(a) and 12 USC § 24 (Seventh), §§ 371(a) and 1828(*o*) empower the OCC to adopt regulations *only* with respect to national banks and do *not* refer to State-chartered nonbank operating subsidiaries. (Because the arguments regarding 12 USC § 371(a), 12 CFR 34.1(b), and 12 CFR 34.4 parallel the arguments with respect to 12 USC § 484(a),

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[48] *Dimension Financial Corp*, 474 US at 368, 374.

[49] *Board of Governors v Investment Company Institute*, 450 US 46, 58-59 n 24 (1981).

12 CFR 7.4006 and 12 CFR 5.43(e)(2), this brief will hereafter only address the latter provisions.)

b. The Alternative Mortgage Transaction Parity Act (AMTPA)[50] provides further evidence of Congress's intent to preserve the States' authority to regulate State-chartered nondepository lenders like Wachovia Mortgage. AMTPA allows State-chartered housing creditors to enter into alternative mortgage transactions (AMTs) in accordance with regulations issued by federal banking agencies.[51] Under 12 USC § 3803(a)(1)-(3) of AMPTA, the OCC has authority to adopt rules permitting AMTs "with respect to banks," the National Credit Union Administration (NCUA) has similar rulemaking authority "with respect to credit unions," and the Office of Thrift Supervision (OTS) has power to promulgate rules "with respect to all other housing creditors."[52]

Thus, under AMTPA, the OTS—not the OCC—is responsible for issuing regulations to permit nondepository State-chartered housing creditors to offer AMTs. AMTPA does not exempt operating subsidiaries from the category of nondepository State-chartered housing creditors regulated by OTS and does not treat operating subsidiaries as being synonymous with "banks," even though Congress was well aware of operating subsidiaries when it enacted AMTPA in 1982.

In addition, § 3802(2) of AMTPA requires all State-chartered housing creditors to comply with "licensing requirements imposed under State law" as well as "applicable regulatory requirements and enforcement mechanisms provided by State

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[50] 12 USC §§ 3801-3806 (Pub L 97-320, title VIII, Sec 803, Oct. 15, 1982, 96 Stat 1545).

[51] AMTs include all residential real estate loans other than traditional fixed-term, fixed-rate mortgages. *National Home Equity Mortgage Ass'n v OTS*, 271 F Supp 2d 264, 267-68 & n 4 (DDC 2003), *aff'd*, 373 F3d 1355, 1357 (DC Cir 2004).

[52] 12 USC § 3803(a)(1)-(3).

law." Thus, in § 3802(2), "Congress explicitly referred to the ongoing validity of state licensing requirements and 'regulatory requirements and enforcement mechanisms provided by State law' governing housing creditors."[53] Section 3802(2) demonstrates Congress's specific intent to preserve the States' authority to license and regulate State-chartered nondepository mortgage lenders, like Wachovia Mortgage.[54] AMTPA thus provides further evidence that Congress never contemplated that 12 USC § 484(a) could be construed to preempt the States from regulating State-chartered, nondepository mortgage lenders owned by national banks.

2. The OCC's reading of § 484(a) conflicts with the fundamental corporate law principle that parent corporations and their subsidiaries are distinct legal entities.

a. Basic tenets of corporate law refute OCC's effort to equate national banks with their operating subsidiaries for purposes of 12 USC § 484(a). This Court has observed that "Congress acts . . . against the background of the total *corpus juris* of the states,"[55] and that federal statutes will be read not to repeal underlying doctrines of State common law unless the statutory language on the point is "clear and explicit"[56] and addresses the narrow issue at hand. Few principles of State corporate law are more basic than that a parent corporation and its

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[53] *Quicken Loans, Inc. v Wood*, 449 F3d 944, 951 (9th Cir 2006).

[54] In view of § 3802(2)'s explicit preservation of state licensing and regulatory authority, it is clear that "the full purposes and objectives of Congress in enacting [AMTPA] do not include delegating complete authority to regulate nonfederally chartered housing creditors to the OTS." *Quicken Loans*, 449 F3d at 952. Rather, under AMTPA the OTS has authority to regulate nondepository State-chartered housing creditors only in those areas that are "essential and intrinsic to the ability to engage in [AMTs]." *Id.* at 953.

[55] *Atherton v FDIC*, 519 US 213, 218 (1997) (citations omitted).

[56] *Norfolk Redevelopment & Housing Auth. v Chesapeake & Potomac Telephone Co*, 464 US 30, 35 (1983).

subsidiary are distinct legal entities.[57] Section 484(a) must be construed against that backdrop.

During the promulgation of 12 CFR 7.4006, the OCC stated that operating subsidiaries are "in essence, incorporated departments or divisions of the [parent] bank."[58] That view cannot be reconciled with fundamental corporate law principles. "It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiary."[59] Large national banks make a business judgment to conduct their mortgage lending business through operating subsidiaries in order to protect the parent banks from the risks of loss and liability created by mortgage loans.[60] As with corporations solely owned or controlled by one or a few individuals, corporations solely owned or controlled by other corporations do not, by virtue of such stock ownership alone, lose their identities as distinct legal entities. Such protection would not exist if the operating subsidiaries were merely "a division or department" of the national bank.

Accordingly, this Court has repeatedly held that statutes will be construed consistent with the "basic tenet of American corporate law" that a "corporate parent" and its "subsidiaries" are "distinct legal entities."[61] Applying these principles, in *Dole Food*, the Court held that a corporation was not protected by the Foreign Sovereign Immunities Act merely because it was a subsidiary of a corporation owned by a foreign state.[62] Likewise,

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[57] *Dole Food v Patrickson*, 538 US 468, 474 (2003); *United States v Bestfoods*, 524 US 51, 61 (1998).

[58] 66 Fed Reg 34,788 (2001).

[59] *Bestfoods*, 524 US at 61.

[60] *See* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Annual Review of Banking and Financial Law 225, 359 (2004) (quoting amicus brief filed by the America Bankers Ass'n et al.).

[61] *Dole Food Co.*, 538 US at 474-475.

[62] *Dole Food Co.*, 538 US at 473-477.

in *Best Foods*, the Court refused to read into the Comprehensive Environmental Response, Compensation, and Liability Act a meaning that would "reject this bedrock principle" that a corporate parent is not liable simply because its subsidiary is liable, noting that "against this venerable common-law backdrop, the congressional silence is audible."[63]

Here, too, the Court should not read into 12 USC § 484(a) a silent repudiation of the State corporate law distinction between a national bank and its subsidiaries. As previously explained, the National Bank Act separately defines a "national bank" and an "affiliate," and only refers to the former in § 484(a). Reading § 484(a) to embrace nonbank operating subsidiaries as well would conflict not only with the provision's plain language, but would depart from long-established corporate law principles well understood by the Congresses that enacted and amended the National Bank Act over the years.

b. Wachovia Mortgage's and the OCC's effort to treat operating subsidiaries of national banks as if they were national banks themselves also cannot be reconciled with Wachovia Mortgage's own conduct in Michigan, which was premised on that entity's status as a foreign State-chartered corporation, rather than being a national bank.

Chapter 10 of the Michigan Business Corporation Act[64] pertains to the regulation of foreign State-chartered corporations such as Wachovia Mortgage Corporation. When Wachovia Mortgage was granted a certificate of authority to do business in Michigan under the Michigan Business Corporation Act, it became authorized to transact in Michigan any business of the character set forth in its application which a domestic corporation formed under this act may lawfully transact.[65] Further, the Michigan Administrator of the Corporation Division is authorized

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[63] *Bestfoods*, 524 US at 61-62; accord, *Dole Food Co*, 538 US at 474-76.

[64] MCL 450.1101 *et seq*.

[65] MCL 450.2016; MCL 450.1107(1).

to revoke the certificate of authority of a foreign corporation to transact business in Michigan upon prescribed conditions.[66]

Wachovia Mortgage did not come to Michigan and apply for a certificate of authority to transact its business claiming it was a national bank. Nor did it claim it was a national bank when it filed its 2005 annual report with Michigan or in its filings of any other previous year. If it could have shown it was a national bank, the Michigan Corporation Division would have been divested of jurisdiction because the Michigan Corporation Act does not apply to banks.[67]

If a State-chartered nonbank operating subsidiary was actually the legal equivalent of a national bank—which it is not—the operating subsidiary would not qualify under Michigan's corporation law to receive a certificate of authority as a foreign corporation. Instead, it would have had to operate as a federally-chartered, FDIC-insured national bank itself, which would effectively eliminate the corporate separation protections that have encouraged national banks to conduct business through operating subsidiaries.

It is highly unlikely that Wachovia Bank would advocate piercing its corporate veil by claiming that Wachovia Mortgage is the legal equivalent of Wachovia Bank if Wachovia Bank learned that its subsidiary had engaged in mortgage fraud, predatory lending, breaches of fiduciary duty, or other unlawful mortgage activities resulting in potential liability. Wachovia Bank and Wachovia Mortgage cannot have it both ways. They cannot claim to be separate for legal liability purposes, and, at the same time, to be identical for preemption purposes. As this Court said in *First National Bank v Walker Bank & Trust*,[68] "[i]t is a strange argument that permits one to pick and choose what portions of the law binds him."

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[66] MCL 450.2041.

[67] MCL 450.1123.

[68] *First National Bank v Walker Bank & Trust*, 385 US 252, 261 (1966).

3. The "incidental powers" of national banks do not amend the plain language of 12 USC § 484(a)

The Court of Appeals tried to sidestep the plain language of 12 USC § 484(a) by stating that the OCC is not purporting to construe that provision. Rather, held the court, the OCC is merely interpreting the scope of 12 USC § 24 (Seventh), which grants national banks "such incidental powers as shall be necessary to carry on the business of banking."[69] That view cannot withstand scrutiny.

Although no one disputes that 12 USC § 24 (Seventh) authorizes national banks to use nonbank operating subsidiaries, national banks' "incidental powers" are not unlimited. A national bank's "incidental powers" cannot reasonably be understood to include the power to obliterate the distinction between "national banks" and their "affiliates." Incidental powers are those that are necessary to carry on the business of banking—but they must be within the limitations prescribed by the National Bank Act. An incidental power must find its genesis from an express power. "Incidental powers can avail neither to create powers which expressly or by reasonable implications are withheld nor to enlarge the powers granted."[70]

While the term "incidental powers" may be broad, it must be interpreted in light of other provisions of the national banking law. Such was the case in *First National Bank in St. Louis v Missouri*,[71] which held that national banks do not possess any "incidental power" to establish branches under the predecessor statute to §24 (Seventh). The Court pointed out that the statutes expressly addressing branch banking in the early 1920's allowed national banks to operate branches only in very limited

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[69] Pet. App. 8a.

[70] *Kimen v Atlas Exch. Nat'l Bank*, 92 F2d 615, 617 (CA7, 1937); *cert den* 303 US 650 (1938).

[71] *First National Bank in St. Louis v Missouri*, 263 US 640 (1924).

circumstances. The Court then held that "it is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power."[72]

In *American Land Title Ass'n v Clarke*,[73] the Second Circuit correctly applied this principle when it determined that § 24 (Seventh) must be interpreted in light of 12 USC § 92, which imposes specific limitations on the insurance activities of national banks. Similarly, Congress has provided specifically for the governance of affiliates, including operating subsidiaries, in 12 USC §§ 221a(b), 161(c) and 481. Congress has carefully separated national banks from their affiliates, including operating subsidiaries, and the general incidental powers of national banks cannot justify the OCC's effort to obliterate those distinctions.

4. The presumption against preemption, the clear statement rule of *Gregory v Ashcroft*, and the constitutional doubt doctrine confirm this reading of the statute.

Several presumptions and clear statement rules confirm what the above arguments have already demonstrated—that 12 USC § 484(a) does not preempt state powers with respect to operating subsidiaries and other affiliates of national banks.

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[72] *First National Bank in St. Louis v Missouri*, 263 US at 656-58. Similarly, in *Texas & Pacific Ry. Co. v Pottorff*, 291 US 245 (1934), this Court rejected the claim that a national bank possessed the "incidental power" to pledge its assets as security for a private party's deposit. This Court held that the claimed incidental power was "inconsistent with many provisions of the National Bank Act," including statutes that expressly permitted national banks to pledge their assets as security only for deposits made by federal, state and local governments. *Id.* at 255 (quotation), 257-58; *see also id.* at 246-47 (argument by petitioner's counsel, based on § 24).

[73] *American Land Title Ass'n v Clarke*, 968 F2d 150, 157 (2d Cir 1992); *cert denied*, 508 US 971 (1993). *Accord, Indep. Ins. Agents of Am., Inc. v Hawke*, 211 F3d 638, 643-45 (DC Cir 2000).

a. The Presumption Against Preemption.

Because the ability of the federal government to preempt State laws is an extraordinary power, this Court assumes Congress does not exercise that power lightly.[74] When considering preemption, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[75] And when there is ambiguity in a federal statute, "we will not attribute to Congress an interest to intrude on State governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers."[76]

Accordingly, in cases where federal law is alleged to preempt an area of traditional State concern, this Court has said that "Congressional intent to supersede State laws must be "clear and manifest."[77] That clear statement rule applies not only to the threshold question whether a statute is preemptive at all, but also to the questions regarding the scope of express preemption provisions.[78]

The Court of Appeals held that the presumption against preemption does not apply, however, on the ground that the federal government, rather than the States, has traditionally regulated national banks.[79] That looks at the issue through the wrong lens. The issue in this case is whether States can regulate State-chartered nonbank operating subsidiaries of national banks. It cannot be denied that (1) States have been the traditional regulators of state-chartered entities, generally; (2) States have been the traditional regulators of State-chartered lending

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[74] *Gregory v Ashcroft*, 501 US 452, 460 (1991).

[75] *Rice v Santa Fe Elevator Corp*, 331 US 218, 230 (1947).

[76] *Gregory v Ashcroft*, 501 US at 470.

[77] *English v General Electric Co*, 496 US 72, 79 (1990).

[78] *Medtronic, Inc*, 518 US at 485; *Cipollone v Liggett Group, Inc*, 505 US 504, 518 (1992).

[79] Pet. App. 7a n 1.

institutions; (3) at least until 2001, States continued to regulate State-chartered lending institutions even when they were operating subsidiaries of national banks; and (4) States have long regulated even national banks themselves although States have not exercised visitorial powers over them, except as authorized by 12 USC § 484(b).

Moreover, through a separate rulemaking proceeding resulting in the adoption of 12 CFR 7.4000, the OCC has asserted that its exclusive visitorial powers over national banks precludes States from enforcing their consumer protection laws against national banks.[80] The OCC has further asserted that this new rule applies to all operating subsidiaries of national banks.[81] The validity of 12 CFR 7.4000, which the States have vigorously disputed, is not before this Court. Should the regulation ultimately be upheld, however, it would only magnify the extent to which traditional State prerogatives are displaced by the OCC's effort to extend its exclusive visitorial powers to State-chartered operating subsidiaries.

Consumer protection is an area traditionally regulated by the States.[82] Indeed, all 50 States and the District of Columbia have enacted consumer protection statutes designed to protect consumers from unfair, deceptive, and abusive business practices in the marketplace.[83] Michigan, for example, has enacted several important comsumer protection measures to protect its citizens from abusive practices in the business of mortgage lending, including the MBLSLA, the SMLA, the Mortgage Lending

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[80] 12 CFR 7.4000; 69 Fed Reg 1904, 1908, 1913-14 (2004).

[81] 69 Fed Reg at 1913.

[82] See e.g. *General Motors Corp v Abrams*, 897 F2d 34, 41-42 (2d Cir 1990) ("Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area.").

[83] National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, Section 1.1 (6th Ed 2004).

Practices Act,[84] which prohibits certain mortgage lending practices, and the recently-enacted Consumer Mortgage Protection Act,[85] which prohibits certain abusive practices regarding fees and services and provides a "bill of rights" for borrowers. Even the Department of Housing and Urban Development and the Department of Treasury have encouraged additional State action to combat predatory lending practices. A joint report entitled *Curbing Predatory Home Mortgage Lending*,[86] recommends, among other things, that the federal government should encourage and work with State and local task forces to combat predatory lending and that States should increase prosecution and enforcement of state consumer protection laws governing fraudulent and aggressive sales practices.

The OCC cannot seriously contend that it has a pedigree similar to that of the States when it comes to enforcing consumer protection laws.[87]

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[84] MCL 445.1601 et seq.

[85] MCL 445.1631 et seq.

[86] Curbing Predatory Home Mortgage Lending, June 20, 2000, p 1, 83 http://www.huduser.org/publications/hsgfin/curbing.html last visited on August 9, 2006.

[87] In fact, it is far from clear that the OCC is even *capable* of enforcing consumer protection laws against national banks and their operating subsidiaries. In 2004, a congressional committee questioned whether the OCC possessed sufficient resources to enforce consumer protection laws, in view of the agency's "primary mission of ensuring the safety and soundness of the national bank system":

> The new [OCC] rules necessitate that the OCC investigate all consumer complaints for 2150 national banks in the 50 States from a single customer assistance center. . . . There are currently only 40 full time staff members allocated for these tasks at the OCC. In contrast, according to the Conference of State Bank Supervisors, State banking agencies and State attorney generals' offices employ nearly 700 full time examiners and attorneys to monitor and enforce consumer law compliance. In the area of abusive mortgage lending practices alone, State bank supervisory agencies initiated 20,332 investigations in 2003 in response to consumer complaints, which resulted in 4,035 enforcement actions.

Thus it misreads history to say that the regulation of an entity such as Wachovia Mortgage has historically been a federal task. If OCC succeeds in its recent efforts to bring State-chartered nonbank operating subsidiaries within its exclusive regulatory orbit, it would constitute a sharp break from the past. The presumption against preemption fully applies in assessing whether the National Bank Act gives the OCC that authority.

The requisite "clear and manifest intent" to preempt does not exist in this case. As explained above, the OCC's exclusive visitorial power in 12 USC § 484(a) is expressly limited to national banks and does not extend to its State-chartered nonbank operating subsidiary. The presumption against preemption bars any attempt to read operating subsidiaries by implication into § 484(a).

b. The *Gregory v Ashcroft* Clear Statement Rule.

In *Gregory v Ashcroft*,[88] this Court held that where a federal statute "would upset the usual constitutional balance of federal and state powers . . . it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance." That clear statement rule "is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[89] The Court further explained that, "inasmuch as this Court, in *Garcia*, has left

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House Comm. on Financial Services, "Views and Estimates of the Comm. on Financial Services on Matters to Be Set Forth in the Concurrent Res. on the Budget for Fiscal Year 2005," 108th Cong, 2d Sess 16 (Comm Print, Feb 25, 2004). *See also* Wilmarth, *OCC's Preemption Rules*, *supra*, note 60, at 314-16, 348-56 (contending that State officials have been far more effective than the OCC in protecting consumers against predatory lending and other abusive financial practices).

[88] *Gregory v Ashcroft*, 501 US at 460.

[89] *Gregory v Ashcroft*, 501 US at 461.

primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."[90]

This clear statement rule also applies to this case and forecloses OCC's attempt to extend § 484(a) to cover operating subsidiaries. As discussed in Section II, *infra*, the practical effect of 12 CFR 7.4006 is to transform State-chartered entities into federal entities that are no longer under the supervision of the States or the limits imposed by the chartering States' corporate laws. Section II explains why the Tenth Amendment is violated by that unilateral transformation of State-created entities. Even if this Court were to disagree, it is plain at the very least that 12 CFR 7.4006 represents a deep intrusion into State corporate governance and a radical departure from ordinary federal-state relations with respect to corporate law. In the words of *Gregory*, before interpreting the statute in such a way, this Court "must be absolutely certain that Congress intended such an exercise."[91]

c. The Constitutional Doubt Doctrine.

This Court has repeatedly recognized that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[92] Reflecting the prudential concern that "constitutional issues need not be needlessly confronted," this principle applies not only where a particular interpretation of a statute clearly would violate the Constitution, but also where the interpretation would raise serious questions about the statute's validity.[93] As just noted,

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[90] *Gregory v Ashcroft*, 501 US at 464.

[91] *Gregory v Ashcroft*, 501 US at 464.

[92] *United States ex rel Attorney General v Delaware & Hudson Co*, 213 US 366, 408 (1909), *quoted in Jones v United States*, 529 US 848, 857 (2000).

[93] *Edward J. DeBartola Corp v Florida Gulf Coast Building & Const Trades Council*, 485 US 568, 575 (1988).

Section II, *infra*, sets forth the serious Tenth Amendment concerns raised by the OCC regulations and its interpretation of 12 USC § 484(a). For this reason as well, any ambiguity in § 484(a) should be construed so that the provision does not deprive States of their longstanding authority to exercise regulatory powers with respect to entities such as Wachovia Mortgage.

B. The *Chevron* doctrine does not authorize the OCC to override Congress's determination to limit 12 USC § 484(a)'s preemptive scope to "national banks."

The OCC and Wachovia argue that the OCC's preemptive regulations should be granted *Chevron* deference, notwithstanding that the literal language of 12 USC § 484(a) covers only "national banks." Their reliance on *Chevron* founders for a variety of reasons.

1. *Chevron* deference is not appropriate under step one of the *Chevron* analysis.

In *Chevron*[94] this Court held that under certain circumstances federal administrative agency interpretations are entitled to deference. But *Chevron* does not permit the OCC to ignore the explicit statutory definition of "national bank" and create a new definition that expands its preemptive reach under the National Bank Act. If the law passed by Congress is clear and unambiguous, it must be applied as written.

Under the first step of *Chevron*, a reviewing court must determine, "employing traditional tools of statutory construction," "whether Congress has directly spoken to the precise question at issue." If it has, the Court must reject an agency interpretation of a statute that is contrary to the expressed intent of Congress.[95] In

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[94] *Chevron USA, Inc v National Resources Defense Council*, 467 US at 842-843.

[95] *Chevron USA, Inc v National Resources Defense Council*, 467 US at 843.

this case, the "precise question" is whether 12 USC § 484(a) preempts the States' authority to regulate State-chartered operating subsidiaries of national banks. As demonstrated in Section I(A), *supra*, the plain language of § 484(a) and other ordinary tools of statutory construction conclusively show that Congress did not intend the provision to cover operating subsidiaries.

This Court has not required any greater precision from Congress before holding that an agency regulation fails "step one" of the *Chevron* analysis. For example, in *MCI Telecomm Corp v American Tel & Tel Co.*,[96] the Court used ordinary tools of statutory construction to reject an FCC ruling that its statutory power to "modify any requirement" of 47 USC § 203—which requires common carriers to file tariffs—authorized it to make tariff filing optional. The Court stated that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[97] Similarly, in *INS v Cardoza-Fonseca*,[98] the Court used ordinary tools of statutory construction, including a study of the legislative history, to reject the INS's ruling that the standard of proof governing one provision of the Immigration and Nationality Act pertaining to the withholding of deportation applies to another provision of the Act pertaining to the withholding of deportation. Rejecting the INS's call for *Chevron* deference, the Court stated: "The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide. Employing traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical." Other examples abound.[99]

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[96] *MCI Telecomm Corp v American Tel & Te. Co*, 512 US 218 (1994).

[97] *MCI Telecomm Corp*, 512 US at 229.

[98] *INS v Cardoza-Fonseca*, 480 US 421, 446 (1997).

[99] *See, e.g., General Dynamics Land Systems, Inc. v Cline*, 540 US 581, 600 (2004) ("Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."); *FDA v Brown & Williamson Tobacco Corp.*,

It will not do, therefore, for Respondents and the OCC to argue that 12 USC § 484(a) does not specifically mention operating subsidiaries and, therefore, does not express the "precise" intent of Congress to prevent the OCC from bringing operating subsidiaries within the statute's coverage. Such an argument would impose on *Chevron* "step one" a specificity requirement far greater than this Court has applied in previous decisions. Moreover, as a practical matter, such an argument would give agencies free rein to issue rules in the absence of an explicit and unambiguous statement by Congress to prohibit such rules. In *Am Bar Ass'n v FTC*,[100] the court rejected just such a claim when it refused to give deference under "step two" of *Chevron* simply because the "[federal] statute does not expressly negate the existence of a claimed administrative power."[101] The court declared that the agency's suggested application of *Chevron* would be "flatly unfaithful to the principles of administrative law . . . and refuted by precedent. . . . Plainly, if we were to presume a delegation of power from the absence of an express withholding of such power, agencies would enjoy virtually limitless hegemony."[102]

Nor can the OCC's regulations survive on the ground that an ambiguity can be found that might arguably give some semblance of support for its reading of the statute. Even if § 484(a) were ambiguous—and it is not—that would not be enough to warrant *Chevron* deference. As this Court recently stated in *Gonzales v. Oregon*, "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved."[103] A clear Congressional command cannot be undone by an agency merely because a pretextual, but deeply flawed,

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529 US 120, 132-33 (2000) (listing numerous canons of ordinary statutory construction to use in applying *Chevron* step one).

[100] *Am Bar Ass'n v FTC*, 430 F3d 457 (DC Cir 2005).

[101] *Id.* at 468 (internal quotation marks and citations omitted).

[102] *Id.* (same).

[103] *Gonzales v Oregon*, 126 S Ct 904, 916 (2006).

argument can be fashioned in defense of the agency's interpretation. In a case such as this one, where the OCC has claimed "broad and unusual authority through an implicit delegation," this Court should conclude that "'Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.'"[104]

Another way of putting this point is that a "rule must be promulgated pursuant to authority Congress has delegated to the official,"[105] and Congress does not delegate to agencies the power to alter or amend statutes. As this Court stated in *Dimension Financial*,[106] an agency's "rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute." Congress did not delegate to the Comptroller the authority to amend 12 USC § 484(a)—whether it be through a regulation specifically addressing § 484(a) or a more general regulation (such as 12 CFR 7.4006) that has the direct effect of amending § 484(a).

2. Agency rules preempting state laws are not entitled to *Chevron* deference.

a. In *Smiley v Citibank*,[107] this Court considered "the substantive (as opposed to preemptive) *meaning* of a statute" and "assume[d] (without deciding) that the latter question must always be decided *de novo* by the courts." The Court's assumption was a proper one. Agency rules purporting to preempt state law are not worthy of *Chevron* deference for several reasons.

One of the principal reasons that Congress sometimes delegates to agencies the authority to "elucidate a specific

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[104] *Id.* at 921 (quoting *FDA v Brown & Williamson Tobacco Corp.*, 529 US 120, 160 (2001)).

[105] *Gonzales*, 126 S Ct at 916.

[106] *Dimension Financial*, 474 US at 374.

[107] *Smiley v Citibank (South Dakota), N.A.*, 517 US 735 (1996).

provision of [a] statute by regulation," is the "relative expertness" of the agency.[108] The preemptive effect of a statute, however, is a legal question within the expertise of the courts—not a federal agency.

This Court has developed an intricate body of law delineating the various types of preemption (express, implied, field) and their applications. Applying that jurisprudence, federal courts resolve preemption disputes on a regular basis. There is no sound reason, therefore, for a federal court to defer to an agency's view of the preemptive scope of a federal statute. In promulgating 12 CFR 7.4006, the OCC stated that the rule "reflects the conclusion we believe a Federal court would reach, even in the absence of the regulation, pursuant to the Supremacy Clause and applicable Federal judicial precedent."[109] But, it would be strange indeed for a federal court to defer to an agency regulation that is itself premised on the agency's prediction of how federal courts would rule on the matter.

Moreover, there are many reasons why agencies' preemption determinations should be viewed with skepticism. First, preemptive regulations of the sort at issue here have the direct and intended effect of expanding the agency's own jurisdiction. Give the obvious self-interest that undergirds an agency's expansion of its own powers, courts should not defer to agency rules having that effect.[110] The OCC has been particularly unrelenting in its effort to expand its power at the expense of the States, and to thereby attempt to give national banks (its sector of

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[108] *Chevron*, 467 US at 843-44; *United States v Mead*, 533 US 218, 228 (2001).

[109] 66 Fed Reg at 34,790.

[110] *See* Cass R. Sunstein, *Chevron Step Zero*, 92 Va L Rev 187, 209-10 (2006); Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 Cornell Journal of Law & Public Policy 203, 204-207 (2004); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo LJ 833, 910-14 (2001).

the industry) a competitive advantage over state-chartered banks.[111]

Second, preemptive regulations, by their very nature, affect the federal-State balance. Even putting to the side concerns about agency capture by regulated industries, administrative agencies have no institutional interest in taking State sovereignty concerns into account. Courts, by contrast, routinely take federalism concerns into account and have no institutional reason not to consider them fully.

A last, critical, point is that in *Garcia v San Antonio Metropolitan Transit Authority*,[112] this Court "left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers."[113] "[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."[114] Granting *Chevron* deference to preemptive agency regulations would undermine this protection and effectively reverse the presumption against preemption so that statutory ambiguity means preemption.

For these reasons, agency regulations are generally not entitled to deference when they preempt State laws. The principal exception is where Congress specifically delegates to an agency the authority to make preemption determinations that have the force of law.[115] The OCC, however, has not been specifically delegated the authority to expand the preemptive reach of the

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[111] *See* Arthur E. Wilmarth, Jr., *Preemption—OCC v Spitzer: An Erroneous Application of Chevron That Should Be Reversed*, BNA's Banking Report, Vol 86, No 8, 379, 387 (Feb. 20, 2006); Wilmarth, *OCC's Preemption Rules*, *supra* note [53], at 236, 274-77, 287-98.

[112] *Garcia v San Antonio Metropolitan Transit Auth*, 469 US 528 (1985).

[113] *Gregory v Ashcroft*, 501 US at 464.

[114] Laurence Tribe, *American Constitutional Law* 6-25, p. 480 (2d ed 1988), *quoted in Gregory v Ashcroft*, 501 US at 464.

[115] See Amicus Brief of the Center for State Enforcement (listing examples of such authorizations).

National Bank Act. Rather, the Comptroller is granted the "authori[ty] to prescribe rules and regulations to carry out the responsibilities of the office." 12 USC § 93a. But as this Court noted in *Gonzales v Oregon*, "a delegation of authority to promulgate . . . *standards* did not include the authority to decide the pre-emptive scope of the federal statute."[116] The delegation of authority to the Comptroller is a far cry from, for example, the specific authorization Congress granted the FCC to "preempt the enforcement of" state and local statutes and regulations interfering with the development of competitive telecommunications services. 47 USC § 253(d). The OCC's self-serving effort to expand its authority is therefore not entitled to any deference under *Chevron*.

b. The OCC and Court of Appeals relied principally upon the pre-*Chevron* decision *Fidelity Federal Savings & Loan Ass'n v de la Cuesta*[117] in concluding that *Chevron* deference fully applies to preemptive regulations. This reliance was misplaced. First, post-*de la Cuesta* and post-*Chevron*, this Court has declined to give *Chevron* deference to numerous preemptive agency regulations. Examples include *Geier v American Honda Motor Co.*,[118] in which the Court appeared to give *Skidmore*[119] deference to Department of Transportation regulations; *Medtronic, Inc. v Lohr*,[120] in which the Court let agency regulations merely "inform" its analysis; and *Louisiana Public Service Commission v FCC*,[121] in which the Court granted no deference to FCC regulations purporting to preempt state depreciation rules. None of these rulings is consistent with the view that *Chevron* deference applies to preemptive agency regulations, and none of

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[116] *Gonzales*, 126 S Ct at 919 (citing *Adams Fruit Co v Barrett*, 494 US 638, 649-50 (1990).

[117] *Fidelity Fed Sav & Loan Ass'n v de la Cuesta*, 458 US 141 (1982).

[118] *Geier v American Honda Motor Co*, 529 US 861 (2000).

[119] *Skidmore v Swift & Co*, 323 US 134, 140 (1944).

[120] *Medtronic, Inc. v Lohr*, 518 US 470, 497 (1996); *id.* at 509 (O'Connor, J., dissenting) (observing that the Court did not apply *Chevron* deference).

[121] *Louisiana Public Service Commission v FCC*, 476 US 355 (1986).

them even hinted that *de la Cuesta* required application of *Chevron* deference.

Second, in *de la Cuesta* it was clear Congress gave the Federal Home Loan Bank Board broad authority to issue preemptive regulations.[122] Congress granted the Board the power "to provide for the organization, incorporation, examination, operation, and regulation" of federal savings associations under § 5 of the Home Owners Loan Act of 1933,[123] and Congress "plainly indicated that the Board need not feel bound by existing state law" because the "statutory language" suggested that "Congress expressly contemplated, and approved the Board's promulgation of regulations superseding state law."[124] Congress has not given the OCC equivalent powers over State-chartered, nonbank operating subsidiaries of national banks. Whereas the question before the Court in *de la Cuesta* was whether the particular preemptive regulations the agency adopted were reasonable, here the question is whether the OCC has the authority to preempt State regulation of State-chartered nonbank operating subsidiaries in the first place. *De la Cuesta* did not resolve whether *Chevron*-like deference should be given to such an inquiry; and for the reasons set forth above, it should not.

c. Finally, the Solicitor General has argued that the OCC regulations at issue should not be viewed as preemption regulations at all, but should instead be viewed as substantive regulations of the sort addressed in *Smiley*.[125] A review of the pertinent regulations belies that contention.

The regulation at issue is 12 CFR 7.4006, which provides that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." It

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[122] *de la Cuesta*, 458 US at 159-63.

[123] 12 USC § 1464(a).

[124] *de la Cuesta*, 458 US at 162.

[125] *See* Brief for the United States as Amicus Curiae, *Burke v Wachovia Bank, NA*, No 05-431 (May 2006), at 19.

is difficult to read § 7.4006 as anything other than a regulation expressly designed to demarcate (as *Smiley* put it) the "pre-emptive[] meaning of a statute."[126] Indeed, in adopting the rule, the OCC cited to four examples of State laws that would be preempted as a consequence of its promulgation.[127] And, as noted earlier, the OCC stated that the rule is based on the agency's conclusion regarding how federal courts would rule on the extent to which the National Bank Act preempts state laws applicable to operating subsidiaries.[128]

The OCC cannot avoid this problem by asserting that its effort to preempt the application of Michigan law to Wachovia Mortgage is premised on 12 CFR 5.34(e)(3), which purports to define the substantive scope of national banks' "incidental powers" under 12 USC § 24 (Seventh). Section 5.34(e)(3), adopted in 2000, provides that an operating subsidiary engages in activities "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." But § 5.34(e)(3) does not contain any statement of an intent to preempt State laws, and the OCC did not describe the regulation as having preemptive effect when the OCC adopted its current language in 2000.[129] Rather, the 2000 rulemaking made clear that § 5.34(e)(3) was designed to *restrict* the powers of operating subsidiaries in accordance with a 1999 congressional directive prohibiting operating subsidiaries from engaging in any activities not authorized for their parent national banks.[130]

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[126] *Smiley*, 517 US at 744.

[127] 66 Fed Reg at 34,788-34,789 n 17.

[128] *Id.* at 34,790.

[129] *See* 65 Fed Reg 12,905, 12,909 (2000).

[130] *See* 65 Fed Reg at 12,909 (explaining that the new language in § 5.34(e)(3) was required by the Gramm-Leach-Bliley Act ("GLBA"), which "makes clear that an operating subsidiary may engage only in activities that are permissible for the parent bank to engage in directly").

Confirming § 5.34(e)(3)'s lack of preemptive effect is that the 2000 rulemaking did not contain any federalism summary impact statement. Such a statement is required under Executive Order 13132 whenever the OCC proposes to adopt a preemptive regulation having substantial effects on the States.[131] Accordingly, § 5.34(e)(3) does not purport to preempt Michigan law here. That is presumably why the OCC deemed it necessary in 2001 to adopt 12 CFR 7.4006—a preemptive regulation not subject to *Chevron* deference.

Finally, if 12 CFR 5.34(e)(3) were (improperly) viewed as the basis for Wachovia's claim of preemption, it would then be a preemptive regulation, not a substantive one. According to the Solicitor General, § 5.34(e)(3) reflects a "policy judgment" of the Comptroller "that national banks should able to use the operating subsidiary as a convenient and useful corporate form for conducting activities without substantial restrictions imposed by states."[132] A regulation based on the desire to displace "restrictions imposed by states" is necessarily a preemptive one, not a substantive one. *Chevron* deference should not, therefore, be accorded it.

3. Agency rules altering the federal-state balance or raising serious constitutional questions are not entitled to *Chevron* deference.

As discussed earlier, the *Gregory v Ashcroft* clear-statement rule and the constitutional doubt doctrine both militate in favor of interpreting 12 USC § 484(a) as not extending to State-chartered nonbank operating subsidiaries. The absence of a clear statement in § 484(a) preempting State regulatory power with respect to operating subsidiaries not only bears on how the statute should be

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[131] *Compare* 66 Fed Reg 34,784, 34,790 (2001) (providing a "Federalism Summary Impact Statement" with regard to 12 CFR 7.4006).

[132] Brief for the United States as Amicus Curiae, *Burke v Wachovia Bank, NA*, No. 05-431 (May 2006), at 19 (internal citations and quotation marks omitted).

construed in the first instance; it also bears on whether the OCC's preemption rules are entitled to *Chevron* deference.

In *Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers*,[133] this Court declined to defer to an agency regulation that "invoke[d] the outer limits of Congress' power." The Court observed that "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of Congressional authority" and that "[t]his concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional State power." Accordingly, held the Court, "we expect a clear indication that Congress intended that result" before deference would be accorded to the regulation.

That reasoning applies with full force here. Although Congress authorized the Comptroller "to prescribe rules and regulations to carry out the responsibilities of the office,"[134] nothing in that grant of power or the language of 12 USC §§ 24 (Seventh) and 484(a) even hints that Congress intended to "invoke the outer limits of Congress' power" or "alter the federal-state framework by permitting federal encroachment upon a traditional State power" such as State licensure of State-chartered lending institutions.[135] For this reason as well, *Chevron* deference is not warranted.

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[133] *Solid Waste Agency of Northern Cook Country v United States Army Corps of Engineers*, 531 US 159, 172-173 (2001)(citations omitted).

[134] 12 USC § 93a.

[135] Similarly, in *Gonzales v Oregon*, 126 S Ct 904 (2006), this Court held that 21 USC § 871(b) did not give the United States Attorney General a "broad authority to promulgate rules" because that section of the Controlled Substances Act only authorized him to issue regulations "which he may deem necessary and appropriate for the efficient execution of his functions under this [Act]." *Id.* at 916-17. Given the narrow grant of rulemaking authority under § 871(b), this Court held that the Attorney General could not "define the substantive standards of medical practice" in a manner that went "well beyond the statute's specific grants of authority." *Id.* at 920.

II. 12 CFR 7.4006 Violates the Tenth Amendment because it Impermissibly Federalizes A State Corporation.

Both the District Court and the Court of Appeals below gave short shrift to Michigan's argument that the Tenth Amendment to the U.S. Constitution was violated by 12 CFR 7.4006.[136] The Court of Appeals reasoned simplistically and erroneously that since Congress has assumed the authority to regulate national banks under the Commerce Clause, the Tenth Amendment can have no possible application to an OCC regulation.[137] That reasoning fails to recognize that, as recent decisions of this Court have held, the Tenth Amendment prevents certain federal intrusions upon the States even where Congress is operating in a field otherwise within the scope of its Commerce Clause power. And the Court of Appeals' reasoning fails to adhere to this Court's decision in *Hopkins Federal Savings & Loan Ass'n v Cleary*,[138] which held that a statute that operates very similarly to 12 USC § 484(a), as construed in 12 CFR 7.4006, violated the Tenth Amendment.

a. Congress has general power to regulate national banks and, in appropriate circumstances, to preempt State laws that affect national banks. That does not end the Tenth Amendment inquiry, however. In *New York v United States*[139] and *Printz v United States*,[140] this Court "held federal statutes invalid, not because Congress lacked legislative authority over the subject

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[136] Pet. App. 12a (Court of Appeals); Pet. App. 23a-24a (District Court).

[137] Pet. App. 12a.

[138] *Hopkins Federal Savings & Loan Ass'n v Cleary*, 296 US 315, 335 (1935). *See also, Chicago Title & Trust Co v Forty-One Thirty-Six Wilcox Bldg Corp*, 302 US 120 (1937), citing *Hopkins* in its holding that the Federal Bankruptcy Code could not be construed in a manner allowing for the filing of a bankruptcy petition on behalf of a corporation whose charter had expired under the law of its chartering state.

[139] *New York v United States*, 505 US 144 (1992).

[140] *Printz v United States*, 521 US 898 (1997).

matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment."[141]

In *New York v United States*, this Court addressed New York's claim that the Low-Level Radioactive Waste Policy Amendments Act of 1985 violated the Tenth Amendment. In holding that the federal government may not "commandeer" the States to enact a federal regulatory program, this Court recognized a "core of sovereignty" retained by the States under the Tenth Amendment and a "boundary between federal and State authority."[142]

In *Printz v United States*,[143] this Court once again recognized our Constitution's establishment of "dual sovereignty." The Court held that certain interim provisions of the Brady Handgun Violence Prevention Act unconstitutionally commandeered state officials to administer federal programs. Citing James Madison, this Court declared that "[a]lthough the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty."[144] This Court's recent State sovereign immunity decisions rely on similar principles.[145]

In sum, the Tenth Amendment has been interpreted "to encompass an implied constitutional limitation on Congress' authority to regulate State activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution."[146] "[I]f a power is an attribute of State sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on

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[141] *Reno v Condon*, 528 US 141, 149 (2000).

[142] *New York v United States*, 505 US at 159, 161, 177.

[143] *Printz v United States*, 521 US 898 (1997).

[144] *Printz*, 521 at 918-919 (citing The Federalist No. 39, at 245 (J. Madison)).

[145] *Federal Maritime Comm'n v South Carolina State Ports Auth.*, 535 US 743, 751, 769 (2002); *Alden v Maine*, 527 US 706, 713-15 (1999).

[146] *South Carolina v Baker*, 485 US 505, 511, n 5 (1988).

Congress."[147] In *Gregory v Ashcroft,*[148] this Court, quoting James Madison, affirmed that the "powers reserved to the several States [under the Constitution] will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."[149] "The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power."[150] The Court of Appeals declined to make that inquiry. Had it done so, it would have concluded that 12 USC § 484(a), as amended by 12 CFR 7.4006, violates principles of state sovereignty protected by the Tenth Amendment.

b. In *Hopkins Federal Savings & Loan Ass'n v Cleary,*[151] this Court found that a section of the Home Owners' Loan Act was an unconstitutional encroachment upon the reserved powers of the State under the Tenth Amendment "to the extent that it permitted the conversion of State associations into federal ones in contravention of the laws of the place of their creation." The reasoning of Justice Cardozo for the Court applies here as well.

i. In *Hopkins*, the State Banking Commissioner of Wisconsin brought suit against a local building and loan association to annul proceedings in which the association sought to convert itself into a federal corporation. The Commissioner sought to compel the State association to continue its business pursuant to the State law under which it was created or wind it up under State dissolution provisions. The building and loan association was organized in Wisconsin and its business, including liquidation, was subject to strict supervision by State agencies. Nothing in the Wisconsin statutes provided for the

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147 *New York v United States*, 505 US 144, 156 (1992).

148 *Gregory v Ashcroft,* 501 US 452 (1991).

149 *Id.* at 458 (quoting The Federalist No. 45, at 292-93 (C. Rossiter ed. 1961) (J. Madison).

150 *New York,* 505 US at 156-157.

151 *Hopkins Federal Savings & Loan Assoc,* 296 US at 335 (1935).

conversion of a Wisconsin-chartered building and loan association into an association chartered by the federal government. Section 5 of the Home Owners Loan Act of 1933 ("HOLA")[152] was amended, however, to permit State associations to be converted into federal ones by a majority vote of the members, without any reference to the provisions of State law. This Court rejected that intrusion by Congress as a violation of the Tenth Amendment[153]:

> A corporation is a juristic person organized by government to accomplish certain ends, which may be public or quasi-public, though for other purposes of classification the corporation is described as private. . . . How they shall be formed, how maintained and supervised, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred.

Under Wisconsin law "associations such as these may be dissolved in ways and for causes carefully defined, in which event the assets shall be converted into money and applied, so far as adequate, to the payment of the creditors." Under HOLA, however, "the same associations are dissolved in other ways and for other causes, and from being creatures of the state become creatures of the Nation." This, held the Court, was an "illegitimate encroachment by the government of the nation upon a domain of activity set apart by the Constitution as the province of the states."[154]

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[152] 12 USC § 1464.

[153] *Hopkins*, 296 US at 336 (citations omitted)

[154] *Hopkins*, 296 US at 338.

The Court reached a similar conclusion two years later in *Chicago Title & Trust Co. v 4136 Wilcox Building Corp.*[155] In that case, the Court construed Section 77B of the federal Bankruptcy Act not to authorize the filing of bankruptcy petitions on behalf of corporations whose charters had expired under state law. Citing *Hopkins*, the Court reasoned that such filings would create "an intrusion by the Federal Government on the powers of the State"; "it hardly will be claimed that the federal government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority."[156]

ii. The reasoning of *Hopkins* applies to 12 CFR 7.4006. The practical effect of that regulation is to transform State-chartered operating subsidiaries into "creatures of the federal government" without the permission of the chartering States and put them beyond the reach of those States in which the corporation does business.[157] Even the supporters of OCC preemption acknowledge that under 12 CFR 7.4006, State-chartered operating subsidiaries of national banks need only follow "the ministerial provisions of state law that provide for the incorporation and governance of state-chartered corporations,"[158] and that when it comes to regulation of those subsidiaries, they "are viewed as mere divisions of the bank . . . [and] are subject to examination and supervision by the OCC to the same extent as the national bank. . . . [T]here is no reason why a state or any other regulator should supervise the activities of a national bank's operating subsidiaries."[159]

The States' loss of power under 12 CFR 7.4006 with respect to State-chartered entities that become operating subsidiaries of

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[155] *Chicago Title & Trust Co. v 4136 Wilcox Bldg Corp*, 302 US 120 (1937).

[156] *Chicago Title & Trust Co*, 302 US at 127, 128.

[157] *Hopkins Federal Savings & Loan Ass'n v Cleary*, 296 US at 335.

[158] Howard N. Cayne & Nancy L. Perkins, *National Bank Act Preemption: The OCC's New Rules Do Not Pose a Threat to Consumer Protection or the Dual Banking System*, 23 Ann Rev Banking & Fin L 365, 404-05 (2004).

[159] *Id.*

national banks is no less than was Wisconsin's loss of power under HOLA with respect to *Hopkins Federal Savings & Loan Association*. The concrete holding of the Court of Appeals is that Wachovia Mortgage need not even register with the State of Michigan, as required by the MBLSLA. It is difficult to see how, under the OCC regulations, Wachovia Mortgage and similar State-chartered entities remain State bodies in anything but origin.

For these reasons, the OCC regulations at issue violate the Tenth Amendment. At the very least, the seriousness of the constitutional question warrants application of the constitutional doubt doctrine and rejection of the OCC's radical expansion of its regulatory authority under the National Bank Act.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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Dated: September, 2006

STATUTORY APPENDIX

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BUSINESS CORPORATION ACT (EXCERPT)
Act 284 of 1972

450.1107 Definitions; F to I.

Sec. 107.

(1) "Foreign corporation" means a corporation for profit formed under laws other than the laws of this state, which includes in its purposes a purpose for which a corporation may be formed under this act.

(2) "Foreign nonprofit corporation" means a corporation organized under laws other than the laws of this state, which includes in its purposes a purpose for which a corporation may be organized under the nonprofit corporation act, Act No. 162 of the Public Acts of 1982, being sections 450.2101 to 450.3192 of the Michigan Compiled Laws.

(3) "Independent director" means a director who meets all of the following requirements:

(a) Is elected by the shareholders.

(b) Is designated as an independent director by the board or the shareholders.

(c) Has at least 5 years of business, legal, or financial experience, or other equivalent experience. For a corporation with securities registered under section 12 of the securities exchange act of 1934, chapter 404, 48 Stat. 881, 15 U.S.C. 78L, "experience" shall mean experience as a senior executive, director, or attorney, or other equivalent experience, for a corporation with registered securities.

(d) Is not and during the 3 years prior to being designated as an independent director has not been any of the following:

(i) An officer or employee of the corporation or any affiliate of the corporation.

(ii) Engaged in any business transaction for profit or series of transactions for profit, including banking, legal, or consulting services, involving more than $10,000.00 with the corporation or any affiliate of the corporation.

(iii) An affiliate, executive officer, general partner, or member of the immediate family of any person that had the status or engaged in a transaction described in subparagraph (i) or (ii).

(e) Does not propose to enter into a relationship or transaction described in subdivision (d)(i) through (iii).

(f) Does not have an aggregate of more than 3 years of service as a director of the corporation, whether or not as an independent director.

* * *

450.1123 Applicability of act generally.

Sec. 123.

(1) Unless otherwise provided in, or inconsistent with, the act under which a corporation is or has been formed, this act applies to deposit and security companies, summer resort associations, brine pipeline companies, telegraph companies, telephone companies, safety and collateral deposit companies, canal, river, and harbor improvement companies, cemetery, burial, and cremation associations, railroad, bridge, and tunnel companies, agricultural and horticultural fair societies, and professional service corporations formed under the professional service corporation act, 1962 PA 192, MCL 450.221 to 450.235. The entities specified in this subsection shall not be incorporated under this act.

(2) This act does not apply to insurance, surety, savings and loan associations, fraternal benefit societies, and banking corporations.

* * *

450.2011 Certificate of authority as prerequisite to transacting business; scope of authority.

Sec. 1011.

A foreign corporation shall not transact business in this state until it has procured a certificate of authority to transact business from the administrator. A foreign corporation may be authorized to transact business in this state that may be transacted lawfully in this state by a domestic corporation, to the extent that it is authorized to transact that business in the jurisdiction where it is organized, but no other business.

* * *

450.2015 Certificate of authority to transact business; application; filing; contents.

Sec. 1015.

To procure a certificate of authority to transact business in this state, a foreign corporation shall file with the administrator an application setting forth all of the following:

(a) The name of the corporation and the jurisdiction of its incorporation.

(b) The date of incorporation and the period of duration of the corporation.

(c) The street address, and the mailing address if different from the street address, of its main business or headquarters office.

(d) The street address of its registered office in this state, the mailing address if different from the street address, and the name of its resident agent in this state at the address, together with a statement that the resident agent is an agent of the corporation upon whom process against the corporation may be served.

(e) The character of the business it is to transact in this state, together with a statement that it is authorized to transact such business in the jurisdiction of its incorporation.

(f) Any additional information as the administrator may require in order to determine whether the corporation is entitled to a certificate of authority to transact business in this state and to determine the fees and taxes prescribed by law.

450.2016 Foreign corporation; application; attaching certificate of good standing; fees; issuance of certificate of authority; duration of authority.

Sec. 1016.

(1) A certificate setting forth that the corporation is in good standing under the laws of the jurisdiction of its incorporation, executed by the official of the jurisdiction who has custody of the records pertaining to corporations and dated not earlier than 30 days before filing of the application, shall be attached to the application of a foreign corporation. If the certificate is in a foreign language, a translation of the certificate under oath of the translator shall be attached to the certificate.

(2) Upon filing of the application, accompanied by the filing and franchise fees prescribed by law, the administrator shall issue to the foreign corporation a certificate of authority to transact business in this state. Upon the issuance of a certificate of authority, the foreign corporation is authorized to transact in this state any business of the character set forth in its application, which a domestic corporation formed under this act may lawfully transact. The authority continues so long as the foreign corporation retains its authority to transact such business in the jurisdiction of its incorporation and its authority to transact business in this state has not been surrendered, suspended, or revoked.

* * *

450.2041 Certificate of authority; grounds for revocation.

Sec. 1041.

In addition to any other ground for revocation provided by law, the administrator may revoke the certificate of authority of a foreign corporation to transact business in this state upon the conditions prescribed in section 1042 upon any of the following grounds:

(a) The corporation fails to maintain a resident agent in this state as required by this act.

(b) The corporation, after changing its registered office or resident agent, fails to file a statement of the change as required by this act.

(c) The corporation fails to file an amended application as required by this act.

(d) The corporation, after becoming the survivor to a merger, fails to file the certificate attesting to the occurrence of the merger as required by this act.

(e) The corporation fails to file its annual report within the time required by this act, or fails to pay an annual filing fee required by this act.

MORTGAGE BROKERS, LENDERS, AND SERVICERS LICENSING ACT

Act 173 of 1987

AN ACT to define and regulate mortgage brokers, mortgage lenders, and mortgage servicers; to prescribe the powers and duties of the financial institutions bureau and certain public officers and agencies; to provide for the promulgation of rules; and to provide remedies and penalties.

The People of the State of Michigan enact:

* * *

445.1653 License or renewal; application; form; investigation; determination; issuance; indemnification.

Sec. 3.

(1) An application for, or renewal of, a license shall be made in writing to the commissioner on a form prescribed by the commissioner. If the commissioner determines after investigation that the experience, character, business reputation, and general fitness of the applicant and its officers, directors, shareholders, partners, and affiliates command the confidence of the public and warrant the belief that the applicant and its officers, directors, shareholders, partners, and affiliates will comply with the law and that grounds for revoking, suspending, or denying a license under this act do not exist, the commissioner shall issue a license to, or renew the license of, the applicant to act as a mortgage broker, mortgage lender, or mortgage servicer.

(2) A license issued under this section does not approve the use of or indemnify the licensee against claims for the improper use of the business name stated in the license.

* * *

445.1655 Minimum net worth.

Sec. 5.

A licensee who acts as a mortgage broker and who receives funds from a prospective borrower before the closing of the mortgage loan shall maintain a net worth of not less than $25,000.00. A licensee who acts as a mortgage lender shall maintain a net worth of not less than $25,000.00. A licensee who acts as a mortgage servicer shall maintain a net worth in an amount determined by the commissioner not exceeding $100,000.00. Net worth shall be determined at the conclusion of the fiscal year of the licensee immediately preceding the date an application for a license, or renewal of a license, is submitted to the commissioner. Net worth shall be disclosed on a form prescribed by the commissioner or on a form prepared or reviewed by a certified public accountant and shall be computed in accordance with generally accepted accounting principles. The following assets shall be excluded in the computation of net worth:

(a) That portion of an applicant's assets pledged to secure obligations of any person other than that of the applicant.

(b) Any asset except construction loans receivable, secured by first mortgages from related companies, due from officers or stockholders of the applicant or persons in which the applicant's officers or stockholders have an interest.

(c) An amount in excess of the lower of the cost or market value of mortgage loans in foreclosure, or real property acquired through foreclosure.

(d) An investment shown on the balance sheet in joint ventures, subsidiaries, or affiliates, which is greater than the market value of the assets.

(e) Good will or value placed on insurance renewals or property management contract renewals or other similar intangible value.

(f) Organization costs.

445.1656 Mandatory registration; rights of registrant; applicability of certain provisions; licensing or registration of real estate broker or salesperson; improper use of business name.

Sec. 6.

(1) The following shall register with the commissioner on a form prescribed by the commissioner:

(a) A mortgage broker, mortgage lender, or mortgage servicer approved as a seller or servicer by the federal national mortgage association or the federal home loan mortgage corporation.

(b) A mortgage broker, mortgage lender, or mortgage servicer approved as an issuer or servicer by the government national mortgage association.

(c) A real estate broker or real estate salesperson licensed under article 25 of the occupational code, Act No. 299 of the Public Acts of 1980, being sections 339.2501 to 339.2518 of the Michigan Compiled Laws, who acts as a mortgage broker for not more than 1 licensee or 1 registrant, or who acts as a mortgage broker, mortgage lender, or mortgage servicer only in connection with real estate sales in which the real estate broker or salesperson affiliated with the real estate broker is engaged and who receives for such services additional compensation beyond the customary commission on real estate sales.

(d) A mortgage broker, mortgage lender, or mortgage servicer which is a subsidiary or affiliate of a depository financial institution or a depository financial institution holding company if the depository institution does not maintain a main office or a branch office in this state.

(2) A registrant is not required to comply with section 3, 4, or 5 and is not subject to annual examination by the commissioner.

(3) A mortgage broker, mortgage lender, or a mortgage servicer which is a subsidiary or affiliate of a depository financial institution or a subsidiary or affiliate of a holding company of a depository financial institution shall not be subject to section 29(1)(b) or (c).

(4) Notwithstanding section 25(m), a mortgage broker, mortgage lender, or a mortgage servicer which is a subsidiary or affiliate of a depository financial institution or a subsidiary or affiliate of a holding company of a depository financial institution may register and become subject to the provisions of the act applicable to registrants.

(5) If a real estate broker or real estate salesperson acts as a mortgage broker, mortgage lender, or mortgage servicer not in connection with real estate sales in which the real estate broker or real estate salesperson affiliated with the real estate broker is engaged, the real estate broker or real estate salesperson shall be licensed or registered as otherwise required under this act.

(6) A real estate broker or real estate salesperson, in connection with real estate sales in which the real estate broker or real estate salesperson affiliated with the real estate broker is engaged, who acts as a mortgage broker on 10 or fewer mortgage loans in any 12-month period from July 1 to June 30 and who receives for such services additional compensation beyond the customary commission on real estate sales shall be exempt from the registration or licensing requirements of this act for that 12-month period. If the broker and all real estate salespersons affiliated with the broker in aggregate brokered more than 30 mortgage loans as described in this subsection in the same 12-month period from July 1 to June 30, then such broker shall obtain a license or shall register as required by this act.

(7) A registration accepted by the commissioner under this section does not approve the use of or indemnify the registrant against claims for the improper use of the business name stated in the registration.

* * *

445.1661 Powers of commissioner generally.

Sec. 11.

(1) The commissioner shall exercise general supervision and control over mortgage brokers, mortgage lenders, and mortgage servicers doing business in this state.

(2) In addition to the other powers granted to the commissioner by this act, the commissioner shall have all of the following powers:

(a) To promulgate reasonable rules under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, as necessary to implement and administer this act.

(b) To deny an application for a license.

(c) To conduct examinations and investigations of any person as necessary for the efficient enforcement of this act and the rules promulgated under this act.

(d) To advise the attorney general or the prosecuting attorney of the county in which the business is conducted that the commissioner believes a licensee, registrant, or person is violating this act. The attorney general or prosecuting attorney may take appropriate legal action to enjoin the operation of the business or prosecute violations of this act.

(e) To bring an action in the Ingham county circuit court in the name and on behalf of this state against the licensee, registrant, or any other person who is participating in, or about to participate in, any unsafe or injurious practice or act in violation of this act or a rule promulgated under this act, to enjoin the person from participating in or continuing the practice or engaging in the act.

(f) To order a person to cease and desist from a violation of this act or a rule promulgated under this act in accordance with section 16.

(g) To suspend or revoke a license or registration in accordance with section 29.

(h) To require that restitution be made in accordance with section 29.

(i) To assess a civil fine in accordance with section 29.

(j) To censure a licensee or registrant.

(k) To issue an order to prohibit a person from being employed by, an agent of, or control person of a licensee or registrant as provided under section 18a.

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445.1663 Complaint; investigation; federal regulatory authority.

Sec. 13.

(1) The attorney general, the commissioner, or any other person may file a complaint with the commissioner alleging that a person has violated this act or a rule promulgated or an order issued under this act. If the complaint is made by the commissioner, he or she shall designate 1 or more employees of the financial institutions bureau to act as the person making the complaint. Upon receipt of a complaint, the commissioner may begin an investigation pursuant to the provisions of this act.

(2) If a complaint is received against a registrant which is a subsidiary of a federally chartered depository financial institution, a copy of the complaint shall be immediately sent to the appropriate federal regulatory authority. The commissioner shall attempt to determine the disposition of the complaint and shall make no investigation of the complaint if the complaint is being adequately pursued by the appropriate federal regulatory

authority.

445.1664 Provisions applicable to investigation.

Sec. 14.

All of the following shall apply to an investigation conducted pursuant to section 13:

(a) The employees or agents of the financial institutions bureau shall complete the investigation within a reasonable period of time.

(b) If the investigation does not disclose evidence of a violation of this act or a rule promulgated or an order issued under this act, the complaint shall not be used in any subsequent decision by the commissioner to issue, renew, suspend, or revoke the license or suspend or revoke the registration of the person against whom the complaint was filed. The results of the investigation shall be forwarded to the complainant and the person against whom the complaint was filed.

(c) In addition to any other action authorized by law, if the investigation discloses evidence of a violation of this act or a rule promulgated or an order issued under this act, the commissioner or the attorney general may prepare a formal complaint to be served on the person against whom the allegations are made and a copy of the formal complaint shall be provided to the complainant.

* * *

445.1666 Cease and desist order; hearing; violation; injunction.

Sec. 16.

(1) After an investigation has been conducted pursuant to section 13, and prior to holding the hearing under section 18, the commissioner may order a person to cease and desist from a violation of this act or a rule promulgated or an order issued under this act.

(2) A person ordered to cease and desist shall be entitled to a hearing before the commissioner if a written request for a hearing is filed with the commissioner not more than 30 days after the effective date of the order. A hearing shall be conducted in accordance with the provisions of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws.

(3) A violation of a cease and desist order issued under this act is a violation of this act and the commissioner or the attorney general may take any action permitted under this act, including making application to the Ingham county circuit court to restrain and enjoin, temporarily or permanently, or both, a person from further violating the cease and desist order.

* * *

445.1668 Notice of hearing on complaint; service; informal conference; settlement; compliance; hearing.

Sec. 18.

(1) After an investigation has been conducted and a formal complaint has been prepared pursuant to section 14(c), the commissioner shall serve upon the person against whom the complaint was filed, and the person who filed the complaint, a notice of a hearing on the complaint pursuant to section 71 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being section 24.271 of the Michigan Compiled Laws, and a notice of an opportunity to settle the complaint through an informal conference.

(2) A person upon whom service has been made pursuant to this section may request, within 15 days after the receipt of notice, an opportunity to settle a complaint in an informal conference. An informal conference shall be held only if the person against whom a complaint has been filed agrees to the informal conference. If an informal conference is held, the hearing on the complaint shall be postponed.

(3) An informal conference may result in a settlement, consent order, waiver, default, or other method of settlement agreed upon by the person complained against and the commissioner. A settlement may include a license or registration revocation or suspension, restitution, or a penalty provided for in this act.

(4) This act does not prevent a person against whom a complaint has been filed from showing compliance with this act, a rule promulgated under this act, or an order issued under this act, as provided in chapter 4 of Act No. 306 of the Public Acts of 1969.

(5) If an informal conference is not held, or does not result in a settlement of a complaint, a hearing on the complaint shall be held as provided in chapter 4 of Act No. 306 of the Public Acts of 1969.

445.1668a Fraud; prohibition; notice; hearing; order.

Sec. 18a.

(1) If in the opinion of the commissioner a person has engaged in fraud, the commissioner may serve upon that person a written notice of intention to prohibit that person from being employed by, an agent of, or control person of a licensee or registrant under this act or a licensee or registrant under a financial licensing act. For purposes of this section, "fraud" shall include actionable fraud, actual or constructive fraud, criminal fraud, extrinsic or intrinsic fraud, fraud in the execution, in the inducement, in fact, or in law, or any other form of fraud.

(2) A notice issued under subsection (1) shall contain a statement of the facts supporting the prohibition and, except as provided under subsection (7), set a hearing to be held not more than 60 days after the date of the notice. If the person does not appear at the hearing, he or she is considered to have consented to the issuance of an order in accordance with the notice.

(3) If after a hearing held under subsection (2) the commissioner finds that any of the grounds specified in the notice have been established, the commissioner may issue an order of suspension or prohibition from being a licensee or registrant or from being employed by, an agent of, or control person of any licensee or registrant under this act or a licensee or registrant under a financial licensing act.

(4) An order issued under subsection (2) or (3) is effective upon service upon the person. The commissioner shall also serve a copy of the order upon the licensee or registrant of which the person is an employee, agent, or control person. The order remains in effect until it is stayed, modified, terminated, or set aside by the commissioner or a reviewing court.

(5) After 5 years from the date of an order issued under subsection (2) or (3), the person subject to the order may apply to the commissioner to terminate the order.

(6) If the commissioner considers that a person served a notice under subsection (1) poses an imminent threat of financial loss to applicants for mortgage loans, the commissioner may serve upon the person an order of suspension from being employed by, an agent of, or control person of any licensee or registrant. The suspension is effective on the date the order is issued and, unless stayed by a court, remains in effect pending the completion of a review as provided under this section and the commissioner has dismissed the charges specified in the order.

(7) Unless otherwise agreed to by the commissioner and the person served with an order issued under subsection (6), the hearing required under subsection (2) to review the suspension shall be held not earlier than 5 days or later than 20 days after the date of the notice.

(8) If a person is convicted of a felony involving fraud, dishonesty, or breach of trust, the commissioner may issue an order suspending or prohibiting that person from being a licensee or registrant and from being employed by, an agent of, or control person of any licensee or registrant under this act or a licensee or registrant under a financial licensing act. After 5

years from the date of the order, the person subject to the order may apply to the commissioner to terminate the order.

(9) The commissioner shall mail a copy of any notice or order issued under this section to the licensee or registrant of which the person subject to the notice or order is an employee, agent, or control person.

445.1668b Hearing; final decision; judicial review; effect of review on order.

Sec. 18b.

(1) A hearing under section 16 or 18a shall be conducted under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. Within 30 days after the commissioner has notified the parties that the case has been submitted to him or her for final decision, the commissioner shall render a decision that shall include findings of fact supporting the decision and serve upon each party to the proceeding a copy of the decision and an order consistent with the decision.

(2) Except for a consent order, a party to the proceeding, or a person affected by an order issued under section 16 or 18a may obtain a judicial review of the order. A consent order may be reviewed as provided under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. Except for an order under judicial review, the commissioner may terminate or set aside any order. The commissioner may terminate or set aside an order under judicial review with the permission of the court.

(3) Unless ordered by the court, the commencement of proceedings for judicial review under subsection (2) does not stay the commissioner's order.

445.1668c Enforcement of order; jurisdiction.

Sec. 18c.

The commissioner may apply to the circuit court of Ingham county for the enforcement of any outstanding order issued under section 15, 16, or 18a.

445.1668d Violation as misdemeanor; penalty.

Sec. 18d.

Any current or former executive officer, director, agent, or control person who violates a final order issued under section 18a is guilty of a misdemeanor punishable by a fine of not more than $5,000.00 or imprisonment for not more than 1 year, or both.

445.1668e Violation of order; exceptions.

Sec. 18e.

A control person who is subject to an order issued under section 18a and who meets all of the following requirements is not in violation of the order:

(a) The control person shall not in any manner, directly or indirectly, participate in the control of a licensee or registrant after the date the order is issued.

(b) The control person shall within 6 months after the date the order is final transfer any interest the control person owns in a licensee or registrant to an unrelated third party.

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445.1672 Violations generally.

Sec. 22.

It is a violation of this act for a licensee or registrant to do any of the following:

(a) Fail to conduct the business in accordance with law, this act, or a rule promulgated or order issued under this act.

(b) Engage in fraud, deceit, or material misrepresentation in connection with any transaction governed by this act.

(c) Intentionally or due to gross or wanton negligence, repeatedly fail to provide borrowers material disclosures of information as required by law.

(d) Suppress or withhold from the commissioner any information that the licensee or registrant possesses and that, if submitted, would have made the licensee or registrant ineligible for licensing or registration under this act or would have warranted the commissioner's denial of a license application or refusal to accept a registration.

(e) Fail to comply with 1966 PA 125, MCL 565.161 to 565.164, regulating the handling of mortgage escrow accounts by mortgagees.

(f) Until proper disbursement is made, fail to place in a trust or escrow account held by a federally insured depository financial institution in a manner approved by the commissioner any money, funds, deposits, checks, drafts, or other negotiable instruments received by the licensee that the borrower is obligated to pay to a third party, including amounts paid to the holder of the mortgage loan, amounts for property taxes and insurance premiums, or amounts paid under an agreement that requires if the mortgage loan is not closed the amounts paid shall be refunded to the prospective borrower or if the mortgage loan is closed the amounts paid shall be applied to fees and costs incurred at the time the mortgage loan is closed. Fees and costs include, but are not limited to, title insurance premiums and recording fees. Fees and costs do not include amounts paid to cover costs incurred to process the mortgage loan application, to obtain an appraisal, or to receive a credit report.

(g) Refuse to permit an examination or investigation by the commissioner of the books and affairs of the licensee or

registrant, or has refused or failed, within a reasonable time, to furnish any information or make any report that may be required by the commissioner under this act.

(h) To be convicted of a felony, or any misdemeanor of which an essential element is fraud.

(i) Refuse or fail to pay, within a reasonable time, those expenses assessed to the licensee or registrant under this act.

(j) Fail to make restitution after having been ordered to do so by the commissioner or an administrative agency, or fail to make restitution or pay damages to persons injured by the licensee's or registrant's business transactions after having been ordered to do so by a court.

(k) Fail to make a mortgage loan in accordance with a written commitment to make a mortgage loan issued to, and accepted by, a person when the person has timely and completely satisfied all the conditions of the commitment before the expiration of the commitment.

(l) Require a prospective borrower to deal exclusively with the licensee or registrant in regard to a mortgage loan application.

(m) Take a security interest in real property before closing the mortgage loan to secure payment of fees assessed in connection with a mortgage loan application.

(n) Except as provided under section 18e, knowingly permit a person to violate an order that has been issued under this act or any other financial licensing act that prohibits that person from being employed by, an agent of, or a control person of the licensee or registrant.

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445.1675 Applicability of act.

Sec. 25.

This act does not apply to any of the following:

(a) A depository financial institution whether or not the depository financial institution is acting in a capacity of a trustee or fiduciary.

(b) A salesperson acting as an agent for a residential builder or residential maintenance and alteration contractor, or a residential builder or residential maintenance and alteration contractor licensed under article 24 of the occupational code, 1980 PA 299, MCL 339.2401 to 339.2412, when a mortgage is made or negotiated in connection with the sale or financing of a residential structure or improvement constructed or improved by that residential builder or residential maintenance and alteration contractor.

(c) A real estate broker or real estate salesperson who is not a mortgage broker, mortgage lender, or mortgage servicer, or who only acts as a mortgage broker in connection with a real estate sale or lease and acts without additional compensation beyond the customary commission on the sales or leases.

(d) A real estate salesperson who acts for a real estate broker as a mortgage broker, mortgage lender, or mortgage servicer and who receives for the services compensation only from the real estate broker for which the salesperson is an agent or employee.

(e) A person licensed under the secondary mortgage loan act, 1981 PA 125, MCL 493.51 to 493.81, not making, brokering, or servicing mortgage loans as described in this act in a 12-month period from July 1 to June 30.

(f) Agencies or corporate instrumentalities of the United States and of this state and its political subdivisions, including the public employees' retirement system.

(g) A mortgage lender that in the aggregate with any affiliates makes 10 or fewer mortgage loans in a 12-month period from July 1 to June 30.

(h) A mortgage servicer that in the aggregate with any affiliates services 10 or fewer mortgage loans in a 12-month period from July 1 to June 30.

(i) A mortgage servicer that in the aggregate with any affiliates services only 75 or fewer land contracts, of which 10 or fewer require the collection of money for the payment of taxes or insurance. This subdivision and subdivision (h) do not exempt a mortgage servicer who collects money for the payment of taxes or insurance from the provisions of 1966 PA 125, MCL 565.161 to 565.164. All fees shall be returned to any mortgage servicer described in this subdivision who applied for a license and paid the fees required by this act and who on December 27, 1988 is exempted from licensing.

(j) An individual licensed to practice law in this state and not engaged in the business of negotiating loans secured by real property, when the individual renders services in the course of his or her practice as an attorney-at-law.

(k) A person who makes mortgage loans exclusively for the benefit of employees of that person if the proceeds of the loan are used to assist the employee in meeting his or her housing needs.

(l) A person acting as a fiduciary with respect to any employee pension benefit plan qualified under the internal revenue code who makes mortgage loans solely to plan participants from plan assets.

(m) A mortgage broker, mortgage lender, or a mortgage servicer which is a subsidiary or affiliate of a depository financial institution or a subsidiary or affiliate of a holding company of a depository financial institution which depository financial institution maintains its main office or a branch office in this state.

(n) A nonprofit corporation that makes, brokers, or services mortgage loans in connection with a neighborhood housing program assisted under the neighborhood reinvestment

corporation act, title VI of Public Law 95-557, 42 U.S.C. 8101 to 8107.

(o) A person determined by the commissioner to meet the qualifications established under section 25a.

* * *

445.1679 Prohibited conduct; misdemeanor; penalty; violation of act or rules; civil fine; suspension or revocation of license or registration; refusal to issue or renew license; proceedings subject to §§ 24.201 to 24.328; bona fide error.

Sec. 29.

(1) A person or any owner, partner, member, officer, director, trustee, employee, agent, broker, or their representative acting on the authority of such person who willfully or intentionally does any of the following is guilty of a misdemeanor punishable by a fine of not more than $5,000.00, or imprisonment for not more than 3 years, or both:

(a) Engages in this state in the business of a mortgage broker, mortgage lender, or mortgage servicer without a license or registration required under this act.

(b) Transfers or assigns a mortgage loan or a security directly representing an interest in 1 or more mortgage loans before the disbursement of 75% or more of the proceeds of the mortgage loan to, or for the benefit of, the borrower. This subdivision does not apply to any of the following:

(i) A land contract not considered to be an equitable mortgage.

(ii) A loan made under a state or federal government program that allows the lender to escrow more than 25% of the loan proceeds for a limited period of time.

(iii) A construction loan.

(iv) A loan that provides in writing that the loan proceeds shall be disbursed to or for the benefit of the borrower in installments or upon the request of the borrower or upon the

completion of renovations or repairs to the dwelling situated on the real property subject to the mortgage loan.

(c) Transfers or assigns a mortgage loan or a security representing an interest in 1 or more mortgage loans to an individual investor unless 1 or more of the following apply:

(i) The transfer or assignment is made through a broker-dealer which is a member of the New York stock exchange.

(ii) The transfer or assignment is made through a broker-dealer who meets all of the following criteria:

(A) The broker-dealer is registered under the uniform securities act, Act No. 265 of the Public Acts of 1964, being sections 451.501 to 451.818 of the Michigan Compiled Laws.

(B) The broker-dealer is not an affiliate of the mortgage lender unless the person acquired the broker-dealer registration, directly or indirectly, before September 1, 1987 under Act No. 265 of the Public Acts of 1964, was affiliated with a mortgage lender before September 1, 1987, and has continuously maintained that registration subsequent to September 1, 1987. For purposes of this subparagraph, if an aggregate of more than 10% of the outstanding voting stock or interest in a corporation, unincorporated organization, partnership, or other legal entity that is a broker-dealer or mortgage lender is sold, transferred, assigned, or otherwise conveyed subsequent to September 1, 1987, the registration shall be considered to not have been continuously maintained.

(C) The broker-dealer acquired the mortgage loan or security on a firm commitment.

(iii) The transfer or assignment is made to a person who the transferor or assignor believes, or has reasonable grounds to believe, is 1 of the following:

(A) A business entity having either net income from operations after taxes in excess of $100,000.00 in its last fiscal year or its

latest 12-month period, or a net worth in excess of $1,000,000.00 at the time of purchase.

(B) An individual who, after the purchase, has an investment of more than $50,000.00 in such loans or securities, including installment payments to be made within 1 year after purchase by the individual, has either personal income before taxes in excess of $100,000.00 for his or her last fiscal year or latest 12-month period and is capable of bearing the economic risk, or net worth in excess of $1,000,000.00, and has the knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of the prospective investment, or has obtained the advice of an attorney, certified public accountant, or investment adviser registered under the investment advisers act of 1940, or an investment adviser registered under Act No. 265 of the Public Acts of 1964 with respect to the merits and risks of the prospective investment.

(iv) A transferor or assignor does not maintain its principal place of business in this state and the transferee or assignee is not a resident of this state and does not maintain its principal place of business in this state.

(2) If the commissioner finds that a licensee or registrant has violated this act or the rules promulgated under this act, the commissioner may do 1 or more of the following:

(a) Assess a civil fine against the licensee, registrant, or a person who controls the licensee or registrant of not more than $1,000.00 for each violation, except that the licensee, registrant, or a person shall not be fined more than $10,000.00 for a transaction resulting in more than 1 violation, plus the costs of investigation.

(b) Suspend or revoke a license or registration or refuse to issue a license or renew a license or registration.

(c) Require the licensee or registrant or a person who controls the licensee or registrant to make restitution to each injured individual, if the commissioner finds that the violation of this

act or a rule promulgated under this act resulted in an injury to 1 or more individuals.

(3) A civil fine assessed under subsection (2) may be sued for and recovered by and in the name of the commissioner and may be collected and enforced by summary proceedings by the attorney general. Each individual injured by a violation of this act or a rule shall constitute a separate violation. In determining under subsection (2) the amount of a fine, whether to suspend or revoke a license or registration, whether to refuse to issue or renew a license, or the amount of restitution, the commissioner shall consider the extent to which the violation was a knowing and willful violation, the extent of the injury suffered because of the violation, the corrective action taken by the licensee or registrant to ensure that the violation will not be repeated, and the record of the licensee or registrant in complying with this act. Any proceedings under this subsection shall be subject to the procedures of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws.

(4) Subsection (2) does not apply to a violation of this act that results from a bona fide error that occurs notwithstanding the adoption and observance of reasonable procedures intended to prevent the occurrence of the error.

* * *

445.1681 Action to obtain declaratory judgment, injunction, or actual damages; limitation.

Sec. 31.

(1) Whether or not a person seeks damages or has an adequate remedy at law, any person, prosecutor, or the attorney general may bring an action, including a class action, to do any of the following:

(a) Obtain a declaratory judgment that a method, act, or practice is a violation of this act.

(b) Obtain an injunction against a person who is engaging in or is about to engage in a method, act, or practice that violates this act.

(c) Except as limited by subsection (2), recover actual damages resulting from a violation of this act, or $250.00, whichever is greater, together with reasonable attorney fees and the costs of bringing the action.

(2) If the licensee or registrant establishes by a preponderance of the evidence that the failure to comply with the act was not willful, intentional, or the result of gross or wanton negligence, the amount recovered pursuant to subsection (1)(c) shall not exceed actual damages.

THE SECONDARY MORTGAGE LOAN ACT

Act 125 of 1981

AN ACT to regulate secondary mortgage loans; to prescribe powers and duties of certain state agencies and officials; to require certain fees; to provide for the establishment of a revolving fund; to provide for the promulgation of rules; and to prescribe civil fines and penalties.

The People of the State of Michigan enact:

* * *

493.56b Powers of commissioner.

Sec. 6b.

(1) The commissioner shall exercise general supervision and control over brokers, lenders, and servicers doing business in this state.

(2) In addition to the other powers granted by this act, the commissioner may do any of the following:

(a) Deny an application for a license or registration.

(b) Conduct examinations and investigations of any person, as necessary to enforce this act and the rules promulgated under this act.

(c) Investigate complaints filed against licensees or registrants.

(d) Advise the attorney general or the prosecuting attorney of the county in which the business is conducted that the commissioner believes a licensee, registrant, or person is violating this act. The attorney general or prosecuting attorney shall bring a legal action to enjoin the operation of the business or prosecute violations of this act.

(e) Bring an action in the Ingham county circuit court to enjoin a person from participating in, continuing to practice, or from engaging in a practice that is an unsafe or injurious practice or that violates this act or a rule promulgated under this act.

(f) Order a person to cease and desist from a violation of this act or a rule promulgated under this act as provided under section 14.

(g) Suspend, revoke, or refuse to issue a license or registration as provided under section 11.

(h) Assess a civil fine as provided under section 27.

(i) Appoint a conservator as provided under section 12a.

(j) Issue an order to prohibit a person from being employed by, an agent of, or control person of, a licensee or registrant as provided under section 14a.

(k) Censure a licensee or registrant.

(3) In the conduct of any examination or investigation under this act, the commissioner may do any of the following:

(a) Issue a subpoena as provided under section 15.

(b) Administer oaths as provided under section 15.

(c) Interrogate a person under oath concerning the business and conduct of affairs of a person subject to this act, and require the production of books, records, or papers relative to the inquiry.

(d) Have free access during regular business hours to the offices, places of business, or other location where the licensee, registrant, or an affiliate of a licensee or registrant, maintains business-related documents, and to the books, accounts, papers, records, files, documents, safes, and vaults of a licensee or registrant. The information obtained during the examination or investigation is exempt from the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, and shall not be

available for public inspection or copying or divulged to any person except as follows:

(i) To the attorney general.

(ii) To a regulatory agency.

(iii) In connection with an enforcement action brought under this or another applicable act.

(iv) To law enforcement officials.

(v) To persons authorized by the Ingham county circuit court to receive the information.

(e) Employ independent investigators to conduct a part or all of the investigation, in the case of an investigation other than an examination.

* * *

493.61 Suspension, revocation, or refusal to renew license or registration; notice; hearing; findings; facts or conditions; surrender of license or registration; preexisting contract not affected; lost or destroyed license or registration certificate.

Sec. 11.

(1) A notice shall be given to a licensee, registrant, or applicant of the commissioner's intention to enter an order to suspend or revoke a license or registration or to refuse to issue a license or registration. The notice shall be in writing, served personally, or sent by certified mail to the licensee, registrant, or applicant.

(2) The licensee, registrant, or applicant may request a hearing to contest the intention to enter an order or refusal within 20 days after service of the notice. If a hearing regarding suspension, revocation, or refusal to issue a license or registration is not requested, the commissioner shall enter a final order regarding the suspension, revocation, or refusal to issue a license or registration. The hearing shall be conducted in accordance with the provisions of the administrative

procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. The commissioner may suspend, revoke, or refuse to issue or renew a license or registration if he or she finds that the licensee or registrant or an owner, director, officer, member, partner, stockholder, employee, or agent of the licensee or registrant has done any of the following:

(a) Made a material misstatement in the application.

(b) Engaged in fraud, deceit, or material misrepresentation in connection with any transaction subject to this act.

(c) Failed after 10 days' written notice of default, to pay the annual operating fee, to maintain in effect the bond as required by the commissioner, or to comply with a demand, ruling, or requirement of the commissioner lawfully made under this act.

(d) Either knowingly or without the exercise of due care to prevent it, violated this act or a rule promulgated under this act.

(3) The commissioner may suspend, revoke, or refuse to renew a license or registration upon a finding of a fact or condition which, if the fact or condition had existed at the time of the original application for the license or registration, clearly would have warranted the commissioner to refuse to issue the license or registration originally.

(4) A licensee or registrant may surrender a license or registration by delivering to the commissioner the license or registration certificate with written notice that the licensee or registrant surrenders the license or registration. The surrender, suspension, or revocation of a license or registration under this act shall not affect the licensee's or registrant's civil or criminal liability for acts committed in violation of this act. The surrender of a license or registration does not affect a proceeding to suspend or revoke a license or registration.

(5) Except as otherwise provided by law, a surrender, suspension, or revocation of a license or registration shall not impair or affect the obligation of a preexisting contract between the licensee or registrant and another person.

(6) A licensee or registrant whose license or registration certificate has been destroyed or lost may comply with this section by submitting to the commissioner a notarized affidavit of the loss accompanied by written notice that the licensee or registrant surrenders the license or registration.

* * *

493.64 Order to cease and desist; issuance; conditions; notice; hearing; failure to appear as consent; service or order; effective date and enforcement.

Sec. 14.

(1) If in the opinion of the commissioner a licensee or registrant is, has, or is about to engage in a practice that poses a threat of financial loss or threat to the public welfare, or is, has, or is about to violate a law or rule, the commissioner may serve a notice as provided in subsection (2).

(2) A notice served under this section shall contain a statement of the facts constituting the alleged practice or violation, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist should be issued against the licensee or registrant. The hearing shall be held not earlier than 30 days nor later than 60 days after service of the notice unless another date is set by the commissioner at the request of the licensee or registrant.

(3) If the licensee or registrant fails to appear at the hearing by a duly authorized representative, the licensee or registrant shall have consented to the issuance of the cease and desist order.

(4) In the event of consent under subsection (3), or if upon the record made at the hearing, the commissioner finds that the practice or violation specified in the notice has been established, the commissioner may serve upon the licensee or registrant an order to cease and desist from the practice or violation. The order may require the licensee or registrant and its directors, officers, members, partners, trustees, employees, and agents to cease and desist from the practice or violation

and to take affirmative action to correct the conditions resulting from the practice or violation.

(5) If the commissioner issues a cease and desist order in conjunction with a summary suspension order, the cease and desist order shall become effective on the date of service.

(6) A cease and desist order issued upon consent shall become effective at the time specified in the order and remain effective and enforceable as provided in the order.

(7) Except as provided in subsections (5) and (6) and to the extent it is stayed, modified, terminated, or set aside by the commissioner or a court, a cease and desist order shall become effective at the expiration of 30 days after the service of the order upon the licensee or registrant.

* * *

493.64d Violation as misdemeanor; penalty.

Sec. 14d.

Any current or former executive officer, director, agent, or control person who violates a final order issued under section 14a is guilty of a misdemeanor punishable by a fine of not more than $5,000.00 or imprisonment for not more than 1 year, or both.

* * *

493.77 Violation of act; making secondary mortgage loans without license as misdemeanor; penalty; civil fine; actions.

Sec. 27.

(1) In addition to the penalties provided by this act, a violation of this act with respect to a particular secondary mortgage loan transaction is also subject to the penalty and remedy provisions of the credit reform act, 1995 PA 162, MCL 445.1851 to 445.1864.

(2) A person, association, nonprofit corporation, common law trust, joint stock company, limited liability company, or any other group of individuals, however organized, or any owner, partner, member, officer, director, trustee, employee, agent, broker, or representative thereof who or which willfully or intentionally engages in this state in the business of making secondary mortgage loans without a license as required under this act, is guilty of a misdemeanor punishable by a fine of not more than $5,000.00, imprisonment for not more than 3 years, or both.

(3) A person who violates this act or directly or indirectly counsels, aids, or abets in a violation is liable, in addition to other penalties and forfeitures imposed by this act, for a civil fine of not more than $1,000.00 for each offense. The civil fine shall be sued for and recovered by the commissioner and shall be collected and enforced by summary proceedings by the attorney general.

(4) Whether or not he or she seeks damages or has an adequate remedy at law, a person, a county prosecutor, or the attorney general may bring an action to do any of the following:

(a) Obtain a declaratory judgment that a method, act, or practice is a violation of this act.

(b) Enjoin a person from engaging in, or who is about to engage in, a method, act, or practice that violates this act.

(c) Recover actual damages resulting from a violation of this act or $250.00, whichever is greater, together with reasonable attorneys' fees and the costs of bringing the action.

* * *

493.81 Powers and duties of attorney general.

Sec. 31.

The powers and duties of the attorney general provided in this act are in addition to his existing powers and duties provided by statutes and common law, and nothing in this act shall

impair or restrict the jurisdiction of any court in any action or proceeding by the attorney general under any other statute or common law.

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IN THE

Supreme Court of the United States

LINDA A. WATTERS, Commissioner,
Michigan Office of Insurance and Financial Services,

Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

National banks' "incidental powers" under the National Bank Act include the power to conduct banking activities through operating subsidiaries that are licensed, regulated and supervised by the Office of the Comptroller of the Currency ("OCC"). National bank activities conducted through an operating subsidiary are subject to the "same terms and conditions" that apply to the conduct of such activities by the national bank. 12 U.S.C. § 24a; 12 C.F.R. § 5.34(e)(3). National banks' federally-authorized mortgage lending activities are regulated and supervised exclusively by the OCC. The questions presented are:

1. Whether national bank mortgage lending activities are subject to exclusive OCC regulation and supervision when conducted through an operating subsidiary, just as they are when conducted directly by the parent bank.

2. Whether the OCC's exclusive regulation and supervision of national bank mortgage lending activities conducted through operating subsidiaries is permissible under the Tenth Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are listed in the caption. Wachovia Mortgage Corporation is a wholly-owned subsidiary of Wachovia Bank, N.A., which in turn is a wholly-owned subsidiary of Wachovia Corporation, a publicly-traded financial services holding company.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 431 F.3d 556. The opinion of the district court (Pet. App. 14a-25a) is reported at 334 F. Supp. 2d 957.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2005. The court of appeals denied a petition for rehearing on January 18, 2006. Pet. App. 28a. The petition for a writ of certiorari was filed on April 18, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Relevant portions of Article VI and Amendment X of the U.S. Constitution; Sections 24, 24a, 36, 43, 93a, 371, 481, 484, 1831v, and 1844 of Title 12, and Sections 6701, and 6714 of Title 15, United States Code; and Sections 5.34, 7.4000, 7.4006, 34.1, and 34.4 of Title 12, Code of Federal Regulations, are reprinted in the appendix to this brief. App., *infra*, 1a-34a. Relevant portions of Michigan's statutes are reprinted in the appendix to Petitioner's brief. Pet. Br. App. 1-34.

STATEMENT OF THE CASE

1. The National Bank Act and OCC Regulation of National Banks. The national banking system originated in 1791, when Congress chartered the first Bank of the United States. *See* Bray Hammond, *Banks & Politics in America* 114-18 (1957); Jonathan R. Macey et al., *Banking Law & Regulation* 3-4 (3d ed. 2001); Br. of the American Bankers' Ass'n, *et al.*, 8-12. The Bank provided a uniform national currency, a depository for public moneys, a source of credit for the

federal government, and a means by which the government could collect tax revenues. Hammond, *supra*, at 128-43. Congress chartered the second Bank of the United States in 1816. *Id.* at 209-26, 230-41. In *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court upheld Congress's power to charter the Bank and invalidated a State tax on the Bank under the Supremacy Clause. U.S. Const., art. VI, cl. 2.

From 1836 until 1863, the United States had no central banking system and no national currency. Macey, *supra*, at 9-10. During the Civil War, Secretary of the Treasury Salmon Chase proposed a national banking system through which the government could borrow money to pay for the war. Hammond, *supra*, at 723-25. Congress responded by enacting the National Currency Act of 1863 and the National Bank Act of 1864. *Id.* at 725-32.

The National Bank Act grants enumerated and "incidental" powers to national banks to engage in the business of banking. *See* 12 U.S.C. § 24. It has long been established that, "in the context of national bank legislation, . . . grants of both enumerated and incidental 'powers' to national banks" are "not normally limited by, but rather ordinarily pre-empt[ ], contrary state law." *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32 (1996).

The National Bank Act also provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or . . . exercised or directed by Congress." 12 U.S.C. § 484(a). "[V]isitorial powers" include examination of the bank's "manner of conducting business" and enforcement of applicable laws and regulations. *Guthrie* v. *Harkness*, 199 U.S. 148, 158 (1905). The limitation on visitorial powers in Section 484 was among the provisions enacted by Congress in 1864 to protect national banks against potentially hostile state actions. Congress was

aware of the earlier history of state hostility to the First and Second Banks of the United States, and it was foreseeable that new frictions would arise from the new national bank system.[1]

To address these concerns, the National Bank Act establishes national banks as "National favorites" and shields them "from the hazard of unfriendly legislation by the States." *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1873). Under the National Bank Act, "the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.'" *Farmers' & Mechanics Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875) (quoting *McCulloch*, 17 U.S. (4 Wheat.) 316, 430 (1819)).

"[T]he Comptroller bears primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh." *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995) (quoting 12 U.S.C. § 24 Seventh). Unless otherwise provided by federal law, the Office of the Comptroller of the Currency ("OCC") exercises exclusive licensing, regulatory, supervisory, examination, and enforcement authority with respect to national banks' compliance with both federal law and state laws that are applicable to national banks. *See* 12 U.S.C. §§ 24 Seventh, 484(a), 1818(b). Except to the extent "expressly and exclusively granted to another regulatory agency," the OCC is authorized to "prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a. *See also*

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[1] *See, e.g.*, Cong. Globe, 38th Cong., 1st Sess. 1893 (Apr. 27, 1864) (statement of Sen. Sumner) (comparing the potentially hostile use of state laws against national banks to the Maryland tax invalidated by the Court in *McCulloch*).

id. § 371(a) (authorizing OCC to "prescribe by regulation or order" restrictions on real estate lending by national banks).

2. National Bank Operating Subsidiaries. The National Bank Act grants national banks "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 Seventh. By regulation first promulgated in 1966, the OCC has determined that the incidental powers of national banks include the power to conduct through "operating subsidiaries" activities that a national bank is authorized to conduct directly. 12 C.F.R. § 5.34. Under this regulation, national banks are licensed by the OCC to conduct specific activities through operating subsidiaries. *Id.* § 5.34(b).[2]

In 1999, Congress enacted the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) ("GLBA"), which endorsed the principle that banking activities conducted through an operating subsidiary are conducted subject to the "same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. § 24a(g)(3)(A). As the Senate Report explained:

> "For at least 30 years, national banks have been authorized to invest in operating subsidiaries that are engaged only in activities that national banks may engage

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[2] Other financial institutions are also authorized to carry out their activities through operating subsidiaries. *See* 12 C.F.R. § 559.3(e) (federal savings associations may establish operating subsidiaries that "may engage in any activity that [the association] may conduct directly"); 12 C.F.R. §§ 223.3(w) (Federal Reserve Board treats operating subsidiaries of member banks as "part of the member bank"); 250.141(c) (Federal Reserve member banks may establish subsidiary corporations "engaged in activities that the bank itself may perform").

> in directly. For example, national banks are authorized directly to make mortgage loans and engage in related mortgage banking activities. Many banks choose to conduct these activities through subsidiary corporations . . . ." S. Rep. No. 106-44, at 8 (1999).

Other provisions of GLBA confirm that it is the nature of the activity conducted, and not the entity in which it is conducted, that determines the applicability of the OCC's exclusive supervisory regime. *See, e.g.*, 12 U.S.C. § 24a(a)(2)(A)(ii); *see infra* p. 20.

3. OCC Regulatory Framework. An interlocking framework of OCC regulations governs national bank mortgage lending activities through operating subsidiaries.

First, the OCC's operating subsidiary regulation parallels the language of GLBA, providing that "[a] national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly," and such activities are conducted "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. § 5.34(e)(1), (3). The OCC comprehensively supervises and regulates the establishment and banking activities of operating subsidiaries by national banks, just as it regulates national banks themselves. *Id.* § 5.34(e).

Second, the OCC's real estate lending regulations implement 12 U.S.C. § 371(a), which grants national banks the power to engage in mortgage lending "subject to . . . such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." The OCC's real estate lending regulations provide that "a national bank may make real estate loans . . . without regard to state law limitations

concerning: . . . [l]icensing [and] registration," 12 C.F.R. § 34.4(a)(1). The real estate lending regulations "appl[y] to national banks and their operating subsidiaries." 12 C.F.R. § 34.1(b)

Third, 12 C.F.R. § 7.4006 provides: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." Section 7.4006 rests on the principle, recognized in both GLBA and 12 C.F.R. § 5.34, that operating subsidiaries conduct activities subject to the "same terms and conditions" as apply to the bank. *See* 66 Fed. Reg. 34,784, 34,788 (July 2, 2001). The OCC determined that a "[f]undamental component" of this principle is that "state laws apply to operating subsidiaries to the same extent as they apply to the parent national bank." *Id.*[3]

Fourth, the OCC's visitorial powers regulation states that "[u]nless otherwise provided by federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under federal law." 12 C.F.R. § 7.4000(a)(3). This regulation specifies that "[s]tate officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law." *Id.* § 7.4000(a)(1). The regulation defines "visitorial powers" to include "[e]xamination of a bank," "[i]nspection of a bank's books and records," "[r]egulation and

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[3] The Office of Thrift Supervision has promulgated a regulation providing that "state law applies to operating subsidiaries [of federal savings associations] only to the extent it applies to [federal savings associations]." 12 C.F.R. § 559.3(n)(1).

supervision of activities authorized or permitted pursuant to federal banking law," and "[e]nforcing compliance with any applicable federal or state laws concerning those activities." *Id.* § 7.4000(a)(2).

4. The Michigan Laws At Issue. Respondents challenged provisions of two Michigan statutes—the Mortgage Brokers, Lenders, and Services Licensing Act and the Secondary Mortgage Loan Act—that (i) require national bank operating subsidiaries to register and pay fees to the State before they may conduct banking activities in Michigan, and authorize the Commissioner to deny or revoke an operating subsidiary's registration (Mich. Comp. Laws §§ 445.1652(1), 445.1656(1)(d), 445.1657(1), 445.1658, 445.1679(1)(a), 493.52(1), 493.53a(d), 493.54, 493.55(4), 493.56a(2), and 493.61); (ii) require operating subsidiaries to submit annual financial statements to the Commissioner and retain certain documents in a particular format (*id.* §§ 445.1657(2), 445.1671, 493.56a(2)); (iii) grant the Commissioner examination and enforcement authority over registrants (*id.* §§ 445.1661, 493.56b); and (iv) authorize the Commissioner to take regulatory or enforcement actions against operating subsidiaries (*id.* §§ 445.1665, 445.1666, 493.58-59, and 493.62a). Michigan's laws exempt operating subsidiaries of national banks that have a branch in Michigan. *Id.* § 445.1652(1)(b), 445.1675(m), 493.53a(d).[4]

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[4] Prior versions of the Michigan laws did not apply to affiliates of a depository institution. *See* 1987 Mich. Pub. Act 173 § 25(m); 1981 Mich. Pub. Act 125. The laws were amended in 1996 and 1997 to exempt only affiliates of depository institutions that have a branch in Michigan. 1996 Mich. Pub. Act 210 § 25; 1997 Mich. Pub. Act 91 § 3a. At the time of the changes, the Michigan Financial Institutions Bureau explained that the changes were designed to increase the revenues that the Bureau could raise through licensing and registration fees (...continued)

Petitioner has general regulatory authority under the Secondary Mortgage Loan Act. *Id.* § 493.56b(1). Under the Mortgage Brokers, Lenders, and Services Licensing Act, the Commissioner has "back up" authority to act upon consumer complaints against national bank operating subsidiaries (in the event Petitioner deems the OCC's response inadequate), and general authority over operating subsidiaries in the absence of a complaint. *Id.* § 445.1663(2).

5. The Proceedings Below. Respondents brought this action seeking a determination that the challenged Michigan statutes, as applied to Wachovia Mortgage Corporation ("Wachovia Mortgage"), are preempted by the National Bank Act and the OCC's regulations. Wachovia Mortgage (previously named First Union Mortgage Corporation) registered under the Mortgage Brokers, Lenders and Servicers Licensing Act, Mich. Comp. Laws § 445.1656 *et seq.*, on March 27, 1997. On January 1, 2003, Wachovia Mortgage became an operating subsidiary of Wachovia Bank, N.A. ("Wachovia Bank"), and thereupon surrendered its Michigan registration in reliance upon federal law. Petitioner acknowledged the cancellation of Wachovia Mortgage's registrations but asserted that Wachovia Mortgage was no longer authorized to conduct mortgage lending activities in Michigan. J.A. 47a-48a.

The district court granted summary judgment in favor of Respondents, holding that the challenged Michigan laws are preempted as applied to national bank operating subsidiaries. Pet. App. 19a-23a. The court noted that "[t]he OCC holds broad and pervasive

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to allow the Bureau to be "self-funded" without having to rely on state legislature appropriations to fund the agency's budget. *See* Michigan Financial Institutions Bureau, *Mortgage Regulation Modernization (SB 871)* (Feb. 20, 1996).

authority to regulate national banking associations," and that "[i]n light of this statutory authority, it was within the OCC's authority to promulgate [12 C.F.R. §] 7.4006." Pet. App. 21a-22a. The court concluded that the Tenth Amendment "is not implicated" because Congress has authority under the Commerce Clause to regulate national banks and their operating subsidiaries. Pet. App. 24a.

The Sixth Circuit unanimously affirmed. Pet. App. 1a-13a. The court held that the OCC's regulations are within its authority and are a reasonable interpretation of the National Bank Act entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 8a. The court concluded that "the Comptroller's regulations do not expand the definition of 'national bank' as Congress used it in [12 U.S.C. §] 484 to include an 'operating subsidiary,'" but rather, "the regulations interpret a national bank's 'incidental powers' under 12 U.S.C. § 24 (Seventh) to include the power to conduct business through an operating subsidiary." Pet. App. 8a.

The court held that "[t]he Comptroller has the authority to define a national bank's 'incidental powers' to include conducting the business of banking—in this case the making of first and second mortgage loans—through an operating subsidiary." Pet. App. 9a. "Having so defined a national bank's power to conduct business through an operating subsidiary," the court determined, "'the OCC further has the authority to preempt state law concerning operating subsidiaries to the same extent that those laws would be preempted with respect to the parent national bank.'" *Id.* at 9a (quoting *Wachovia Bank, N.A.* v. *Burke*, 414 F. 3d 305, 318 (2d Cir. 2005)).

The court concluded that "[t]he regulations, specifically section 7.4006, simply reflect the eminently reasonable conclusion that when a bank chooses to utilize the authority it is granted under federal law, it ought not

be hindered by conflicting state regulations." *Id.* at 11a. Each court of appeals that has considered the issue has reached the same result. *See Nat'l City Bank of Ind.* v. *Turnbaugh*, 463 F.3d 325 (4th Cir. 2006); *Wells Fargo Bank, N.A.* v. *Boutris*, 419 F.3d 949 (9th Cir. 2005); *Wachovia Bank, N.A.* v. *Burke*, 414 F.3d 305, 318-21 (2d Cir. 2005).[5]

SUMMARY OF THE ARGUMENT

1. a. The Michigan statues at issue in this case are preempted by the National Bank Act. The National Bank Act grants national banks both enumerated powers and all "incidental powers" needed to carry on the business of banking. 12 U.S.C. § 24 Seventh. The OCC has authority to determine the scope of national banks' incidental powers, and its reasonable determinations receive *Chevron* deference. *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 & n.2. For 40 years, the OCC has recognized that a national bank's incidental powers include the power to conduct banking activities, such as mortgage lending, through an operating subsidiary that is licensed, supervised, and regulated by the OCC. 12 C.F.R. § 5.34. In 1999, Congress confirmed that national banks may conduct their banking activities through operating subsidiaries, "subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. § 24a.

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[5] Every district court to have decided the issue has also reached this result. *See Nat'l City Bank of Ind.* v. *Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005); *Wachovia Bank, N.A.* v. *Burke*, 319 F. Supp. 2d 275 (D. Conn. 2004); *Wells Fargo Bank, N.A.* v. *Boutris*, 265 F. Supp. 2d 1162 (E.D. Cal. 2003); Pet. App. 14a-25a.

The Court has long "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as . . . not normally limited by, but rather ordinarily pre-empting, contrary state law. *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32 (1996). Accordingly, "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies." *Id.* at 34. *See also Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373 (1954). Michigan's laws are preempted under Section 24 Seventh because they require national banks to obtain the State's permission to engage in mortgage lending through an operating subsidiary, and condition the exercise of that power on submission to State supervision, examination, and enforcement authority.

That conclusion is confirmed by Congress's recognition that national banks conduct their activities through operating subsidiaries subject to the "same terms and conditions" that apply to the national bank. 12 U.S.C. § 24a. The ordinary meaning of "terms and conditions" is "prerequisites," "restrictions," or "limitations." Michigan's laws seek to impose additional prerequisites, restrictions, and limitations on the exercise of national bank lending powers through operating subsidiaries and thus are preempted.

The "terms and conditions" that govern national bank activities include the requirement that such activities are subject to the OCC's exclusive "visitorial" authority, *i.e.*, that with limited exceptions specified by federal law, only the OCC examines, regulates, and supervises national banking activities. 12 U.S.C. § 484. Section 484 does not specifically mention operating subsidiaries, but that is not surprising given that national bank operating subsidiaries did not exist until a century after Section 484 was enacted. Furthermore, Congress recognized, in GLBA, that national banks conduct

activities through operating subsidiaries subject to the same terms and conditions that apply to national banks.

b. Michigan's laws are also preempted by several notice-and-comment rules promulgated by the OCC. The OCC's operating subsidiary rule, like GLBA, provides that national bank activities conducted through an operating subsidiary are subject to the "same authorization, terms, and conditions that apply to the conduct of those activities by the parent bank." 12 C.F.R. § 5.34(e)(3). A second OCC regulation, 12 C.F.R. § 7.4006, reflects the OCC's determination that the "same terms and conditions" language of 12 U.S.C. § 24a and 12 C.F.R. § 5.34 means that "state laws apply to national bank operating subsidiaries to the same extent that those laws apply to the national banks." And a third set of OCC regulations, governing real estate lending, provides that national bank operating subsidiaries are not subject to state licensing and registration requirements. 12 C.F.R. §§ 34.1(b), 34.4(a). These rules are within the OCC's delegated rulemaking authority, and thus have "no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). "[A] pre-empting regulation's force does not depend on express congressional authorization to displace state law," *id.* at 154, but in this case Congress *has* granted such authorization to the OCC. *See* 12 U.S.C. § 43(a).

The OCC's reasonable interpretations of provisions of the National Bank Act (including the scope of national banks' incidental powers under Section 24 Seventh and the meaning of "same terms and conditions" in Section 24a) receive deference under the *Chevron* doctrine. *See, e.g., NationsBank*, 513 U.S. at 256-57. In a prior case involving the OCC, the Court distinguished "the question of the substantive . . . *meaning* of a statute" from "the question *whether* a statute is preemptive." *Smiley*, 517 U.S. at 744. Here, as in *Smiley*, Michigan's laws clearly

conflict with the substantive meaning of federal law as reasonably interpreted by the OCC, and thus the Court need not decide whether the OCC's answer to the second question receives *Chevron* deference. If it does, the Court should adhere to its recognition that agencies are "uniquely qualified" to determine whether a state law conflicts with a federal regulatory scheme, and therefore the agency's views on preemption are entitled to significant weight. *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 496 (1996). Both questions identified in *Smiley* require policy determinations, and therefore the rationale of *Chevron*—that policy determinations should be made by a politically accountable branch of government—supports *Chevron* deference on both questions.

2. a. The OCC's regulations are consistent with principles of corporate law. The OCC regulates only national banking activities conducted through operating subsidiaries. It does not regulate corporate existence or corporate governance, which are determined by the law of the chartering State. Affiliated corporations often prepare consolidated financial statements, and corporate law allows subsidiaries to be treated as part of the parent corporation for regulatory purposes.

b. The OCC's exclusive supervision of mortgage lending conducted by national banks through operating subsidiaries also passes muster under the Tenth Amendment. Congress has the power to regulate commercial lending under the Commerce Clause, and "where a power is delegated to Congress in the Constitution the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York* v. *United States*, 505 U.S. 144, 156 (1992). Moreover, the federal government is not seeking to "commandeer" state officials to carry out a federal program. To the contrary, the OCC has assumed sole responsibility for supervising national bank lending conducted through operating

subsidiaries. Finally, the OCC does not regulate corporate formation, dissolution or matters of corporate governance. It does regulate banking activities conducted through operating subsidiaries, but exclusive federal regulation of activities of state-chartered corporations is common and does not encroach on matters reserved to the States. Because there is clearly no Tenth Amendment violation in this case, and the OCC's supervision does not upset the usual balance of federal and state powers, there is no basis for applying a "clear statement" or "narrow construction" rule to the provisions of the National Bank Act.

ARGUMENT

I. National Bank Mortgage Lending Activities Are Supervised Exclusively By The OCC, Whether They Are Conducted Through An Operating Subsidiary Or Directly By The Bank.

Petitioner does not dispute the key principles necessary to resolve this case. A national bank such as Wachovia Bank is authorized by federal law to engage in mortgage lending activities. 12 U.S.C. § 371(a). Mortgage lending by a national bank is supervised and regulated exclusively by the OCC, not state banking regulators. *Id.*; *see also id.* § 484. And national banks' incidental powers include the power to conduct mortgage lending activities through an operating subsidiary as well as directly through the bank. 12 U.S.C. §§ 24 Seventh, 24a; Pet. Br. 21 ("[N]o one disputes that 12 U.S.C. § 24 (Seventh) authorizes national banks to use nonbank operating subsidiaries . . . .").

Petitioner nevertheless asserts that national bank mortgage lending activities, when conducted through an operating subsidiary rather than directly by the parent bank, become subject to state supervision and regulation. For two mutually-reinforcing reasons, Petitioner is incorrect. *First*, a national bank's incidental powers

under 12 U.S.C. § 24 Seventh include the power to conduct mortgage lending through an operating subsidiary. In addition, this Court has long recognized that States may not impose conditions on the exercise of national bank powers. Congress and the OCC have determined that when national banks conduct activities through an operating subsidiary, they do so subject to the "same terms and conditions" that apply to the conduct of those activities by the bank itself. *Second*, the OCC's regulations provide for exclusive OCC supervision and regulation of mortgage lending activities conducted through operating subsidiaries and preempt conflicting state laws. *See Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982). The OCC's determinations concerning the scope of national banks' incidental powers and the meaning of "same terms and conditions" are entitled to deference under the *Chevron* doctrine. Federal statutes and regulations, considered separately or in tandem, lead to the conclusion that a national bank's federally-authorized mortgage lending activities are regulated and supervised solely by the OCC, whether conducted directly by the bank or indirectly through an operating subsidiary. Thus, Petitioner's attempt to regulate here is barred.

A. Michigan's Laws Are Preempted Under The National Bank Act and GLBA.

1. A National Bank's Incidental Powers Under Section 24 Seventh Include The Power To Conduct Mortgage Lending Through An Operating Subsidiary.

The National Bank Act grants national banks both "enumerated powers" (such as the powers to accept deposits and make loans) and "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 Seventh. "Incidental powers" include business activities that are "usual and useful" in the

business of banking. *Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373, 377 (1954). *See also Arnold Tours, Inc.* v. *Camp*, 472 F.2d 427, 432 (1st Cir. 1972). The Comptroller is authorized to interpret the scope of § 24 Seventh and "has discretion to authorize activities beyond those specifically enumerated" in the National Bank Act. *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. at 258 n.2. The OCC's reasonable exercise of that discretion is entitled to deference under the *Chevron* doctrine. *See id.* at 256-57; *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987).

For 40 years, the Comptroller has recognized that the incidental powers of national banks include the power to carry out federally-authorized banking activities through an operating subsidiary. *See* 31 Fed. Reg. 11,459 (Aug. 31, 1966). The Comptroller's regulation authorizes national banks to conduct through operating subsidiaries only those activities that the national bank is authorized to conduct directly. 12 C.F.R. § 5.34(e). A national bank must submit an application or notification to the OCC whenever it establishes or purchases an operating subsidiary, or undertakes a new activity in an existing operating subsidiary. 12 C.F.R. § 5.34(b) & (e)(5). All activities of national bank operating subsidiaries are examined and supervised by the OCC, just as the OCC examines and supervises activities of national banks. 12 C.F.R. § 5.34(e). "An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by the parent national bank." *Id.* § 5.34(e)(3).

Operating subsidiaries are useful in the business of banking for a variety of reasons. They may assist in "controlling operations costs, improving effectiveness of supervision, [facilitating] more accurate determination of profits, decentralizing management decisions, or separating particular operations of the bank from other

operations." 31 Fed. Reg. 11,459, 11,460 (Aug. 31, 1966). In addition, "the use of a separate subsidiary structure can enhance the safety and soundness of conducting new activities by distinguishing the subsidiary's activities from those of the parent bank (as a legal matter) and allowing more focused management and monitoring of its operations." 61 Fed. Reg. 60,342, 60,354 (Nov. 27, 1996). *See also* Br. of Clearing House Ass'n.

Operating subsidiaries are a ubiquitous feature of the banking world. The OCC has licensed nearly 500 operating subsidiaries that deal directly with consumers,[6] and many others conduct activities that do not involve direct interactions with consumers. This Court's decision in *NationsBank* upheld the OCC's decision to authorize a national bank, via an operating subsidiary, to act as an agent in the sale of annuities. *See NationsBank*, 513 U.S. at 258-60. Similarly, in *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388 (1987), the Court upheld the OCC's determination that national banks may offer discount brokerage services through operating subsidiaries. In both cases, the Court's analysis was not altered by the fact that the national bank's powers were exercised through an operating subsidiary.

The power to conduct banking activities through operating subsidiaries is not confined to national banks. Federal savings and loan associations are also authorized to establish operating subsidiaries that "may engage in any activity that the [parent association] may conduct directly." *See* 12 C.F.R. § 559.3(e). Moreover, "[s]tate law applies to operating subsidiaries [of federal savings associations] only to the extent it applies to [the parent association]." 12 C.F.R. § 559.3(n)(1). In addition, the Federal Reserve Board treats operating subsidiaries of

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[6] www.occ.treas.gov/consumer/Report - 2006.xls.

member institutions (which include state-chartered banks) as "part of the member bank." 12 C.F.R. § 223.3(w); *see id.* § 250.141(c). All 50 States authorize state-chartered banks to engage in banking activities through operating subsidiaries.[7]

In sum, national banks are authorized to establish operating subsidiaries through which the bank may conduct its authorized activities pursuant to the "same terms and conditions" that apply to the national bank itself.

2. Congress Has Recognized That National Banks Conduct Banking Activities Through Operating Subsidiaries "Subject To The Same Terms And Conditions" That Apply To The National Bank.

In the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 121, 113 Stat. 1338 (1999) ("GLBA"), Congress recognized that national banks conduct activities through operating subsidiaries subject to the same terms and conditions that apply to such activities when conducted by the bank. GLBA authorized national banks to own and operate a new type of subsidiary, "financial subsidiaries,"

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[7] *See* CSBS, *2004/2005 Profile of State-Chartered Banking* (20th ed.), at § III-42. Some States expressly provide that operating subsidiaries of state-chartered banks are treated as part of the parent bank for purposes of state laws regulating mortgage loans. *See, e.g.*, Ohio Admin. Code § 1301:1-3-10(E); Tenn. Code Ann. § 45-13-103(b); Tex. Fin. Code Ann. § 156.202(1)(A); Va. Code Ann. § 6.1-411(3). Other States have codified 12 C.F.R. § 7.4006, as a matter of state law. *See* Colo. Rev. Stat. Ann. § 5-3.5-303 ("Any provision of this article preempted by federal law with respect to a national bank or federal savings association shall also, to the same extent, not apply to an operating subsidiary of a national bank or federal savings association"); Ky. Rev. Stat. Ann. § 287.015 (same); Penn. Stat. § 456.504 (same).

that conducts activities that are "financial in nature." 12 U.S.C. § 24a(a)(2)(A)(i). Congress defined financial subsidiaries by distinguishing them from operating subsidiaries, which it described as national bank subsidiaries engaged "solely in activities that national banks are permitted to engage in directly *and are conducted subject to the same terms and conditions that govern the conduct of such activity by national banks.*" 12 U.S.C. § 24a(g)(3)(A) (emphasis added). Congress reiterated the "same terms and conditions" language in another provision of GLBA that authorizes financial subsidiaries, in addition to conducting "financial" activities, to conduct activities that the parent national bank could conduct directly "*subject to the same terms and conditions that govern the conduct of the activities by a national bank.*" 12 U.S.C. § 24a(2)(A)(ii) (emphasis added).[8] Congress thus provided that national banking activities are governed by the "same terms and conditions" whether those activities are conducted through an operating subsidiary, a financial subsidiary, or directly by the parent national bank.

Other provisions of GLBA demonstrate that when Congress wanted to allow State regulation of activities of national bank subsidiaries, it said so expressly. For example, GLBA provides that "[s]ecurities activities

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[8] In 1996, three years before GLBA was enacted, the OCC expanded the scope of 12 C.F.R. § 5.34 to authorize a special category of operating subsidiaries to engage in activities "different from [those] permissible for the parent national bank." 61 Fed. Reg. 60,342, 60,351 (Nov. 27, 1996). In GLBA, Congress authorized financial subsidiaries to undertake an even broader range of activities than "special" operating subsidiaries, but reinstated the OCC's longstanding principle that an operating subsidiary conducts only activities that can be conducted by the bank itself. The OCC amended 12 C.F.R. § 5.34 to implement GLBA. 65 Fed. Reg. 12,905 (Mar. 10, 2000).

conducted in a functionally regulated subsidiary of a depository institution shall be subject to regulation by the Securities and Exchange Commission, *and by relevant State authorities*, as appropriate . . . to the same extent as if they were conducted in a nondepository institution subsidiary of a bank holding company." 12 U.S.C. § 1844(c)(4)(A) (emphasis added). Similarly, "insurance agency and brokerage activities and activities as principal conducted in a functionally regulated subsidiary of a depository institution *shall be subject to regulation by a State insurance authority* to the same extent as if they were conducted in a nondepository institution subsidiary of a bank holding company." *Id.* § 1844(c)(4)(B) (emphasis added).[9] By specifying that banking activities are subject to the "same terms and conditions" whether conducted through operating subsidiaries, *id.* § 24a(g)(3)(A), financial subsidiaries, *id.* § 24a(a)(2)(A)(ii), or directly by national banks, Congress made clear that national banking activities such as mortgage lending are subject to uniform terms and conditions that do not change when the activity is conducted through a subsidiary.

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[9] Other federal statutes and regulations confirm that States have authority to regulate these specified activities. *See* 12 U.S.C. §§ 1820a, 1831v; 12 C.F.R. § 5.34(e)(3) & 5.39(k). Moreover, GLBA § 104(b), 15 U.S.C. § 6701(b), makes national banks' insurance activities subject to state licensing and regulation. *See also* GLBA, §§ 201 & 202 (amending the Securities and Exchange Act to provide that securities activities conducted directly by a national bank are subject to SEC regulation).

3. Grants Of Incidental Powers To National Banks Preempt State Laws That Condition The Exercise Of Those Powers.

The Court has long "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32 (1996). Consequently, "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies." *Id.* at 34. Petitioner's assertion of authority to approve, regulate, and supervise national bank mortgage lending activities conducted through an operating subsidiary violates these longstanding principles.

For more than a century, this Court has held that States cannot impair or condition national banks' exercise of their federally authorized enumerated and incidental powers.[10] In *Franklin National Bank of Franklin Square* v. *New York*, 347 U.S. 373, 375-79 (1954), for example, this Court held that national banks have the "incidental power" to advertise and to use the word "savings" in their advertising. Justice Jackson's opinion for the Court looked to the National Bank Act, and held that incidental powers under Section 24 Seventh include use of business devices that are "usual and useful" in "[m]odern competition," and are to be broadly construed unless Congress provides "some affirmative indication to justify any interpretation" to the contrary. *Id.*

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[10] *See, e.g., Farmers' & Mechs. Nat'l Bank* v. *Dearing*, 91 U.S. 29, 33-35 (1875); *Easton* v. *Iowa*, 188 U.S. 220, 229 (1903); *First Nat'l Bank of San Jose* v. *Cal.*, 262 U.S. 366, 368-69 (1923).

Franklin held that national banks' incidental power to advertise preempted state laws that conditioned and impaired national banks' exercise of those federal powers. The Court found "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances." *Id.* at 378.

This Court reaffirmed *Franklin* in *Barnett Bank*, which unanimously held that a federal statute that authorizes national banks to sell insurance in small towns preempted a state statute that forbids them to do so. In *Barnett Bank*, the Court noted that state laws that do *not* impair or condition a national bank's exercise of its powers are not preempted by federal law. *See* 517 U.S. at 33. *See also* 12 C.F.R. § 34.4(b). Accordingly, state laws governing subjects such as contracts, torts, trusts, and property, zoning, and criminal law generally are not preempted as applied to national banks' activities. But "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies." *Id.* at 34.[11]

Barnett Bank reaffirmed this Court's longstanding jurisprudence that emphatically rejects the idea that there is a general federal policy of "equality" between national banks and state-supervised institutions: "Congress did not intend to subject national banks' power

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[11] State laws that interfere with national bank powers are preempted regardless of whether they were intended to protect consumers. *See, e.g., Franklin*, 347 U.S. at 374, 377-79; *Easton* v. *Iowa*, 188 U.S. 220, 227-30. *See also* 12 U.S.C. § 43(a) (requiring OCC to follow notice and comment procedures in connection with opinion letters or interpretive rules that determine "Federal law preempts the application to a national bank of any State law regarding . . . *consumer protection*.") (emphasis added).

to local restrictions, [where] the federal power-granting statute . . . contain[s] 'no indication that Congress [so] intended . . . as it has done *by express language* in several other instances.'" *Barnett Bank*, 517 U.S. at 34 (quoting *Franklin*, 347 U.S. at 378 & n.7) (emphasis and second alteration in original). These "other instances"—national bank branching, interest rates, and trust operations, *see* 12 U.S.C. §§ 36, 85 & 92a—do not include national banks' power to engage in mortgage lending, whether directly or through an operating subsidiary.

Rather than adopting a policy of "equality," the National Bank Act makes national banks "National favorites." *See Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1874). In *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 9-11 (2003), the Court reiterated *Tiffany*'s statement that the National Bank Act reflects Congress's intent to protect national banks from "unfriendly State legislation." 539 U.S. at 10-11 (quoting *Tiffany*, 85 U.S. (18 Wall.) at 412).

Barnett Bank also rejects the contention (Pet. Br. 23-26) that a "presumption against preemption" applies in the context of national bank powers. *Barnett Bank* unanimously held that that "grants of both enumerated and incidental 'powers' to national banks" are "not normally limited by, but rather ordinarily pre-empt[], contrary state law." 517 U.S. at 32.

More generally, "an 'assumption' of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000) (quoting *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Here, the history of "significant federal presence" reaches back to *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819). Thus, Petitioner's reliance on a "presumption against preemption" is misplaced.

It is undisputed that a national bank's incidental powers include the power to conduct federally-authorized banking activities through an operating subsidiary. *See* Pet. Br. 21. The national bank exercises *its* federal powers through its operating subsidiary. Thus, the operative presumption in this case is that state laws that prevent, interfere with, or condition the exercise of national bank powers are preempted. *Barnett Bank*, 517 U.S. at 34; *Franklin*, 347 U.S. at 378-79.

Given national banks' "incidental power" pursuant to the National Bank Act to exercise their mortgage lending powers through operating subsidiaries, Michigan cannot, under *Franklin* and *Barnett Bank*, condition national banks' exercise of those powers on the grant of state permission.[12] Nor, under *Franklin* and *Barnett Bank* (and the many cases upon which they rely), can Michigan impede or impair a national bank's decision to exercise its mortgage lending powers through the "usual and useful" corporate structure of an operating subsidiary by subjecting national banks to fragmented state and local mortgage-lending regulation and supervision.

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[12] *See also First Nat'l Bank of E. Ark.* v. *Taylor*, 907 F.2d 775, 777-78 (8th Cir. 1990); *Bank of Am., Nat'l Trust & Sav. Ass'n* v. *Lima*, 103 F. Supp. 916, 917-18 (D. Mass. 1952).

4. Michigan's Laws Contravene The Principle That National Bank Powers Exercised Through Operating Subsidiaries Are Subject To The "Same Terms and Conditions" As Powers Exercised Directly By The National Bank.

In this case, well-established principles governing national bank powers and preemption are confirmed by specific statutory language. In 1999, Congress recognized that national banks' activities, when conducted through subsidiaries, are subject to the "same terms and conditions" as if they had been exercised directly by the bank itself. *See* 12 U.S.C. § 24a(a)(2)(A)(ii) & (g)(3)(A). The phrase "terms and conditions" ordinarily refers to prerequisites, restrictions, and limitations. *See* 3 Oxford English Dictionary 683, 684 (2d ed. 1989) ("condition" means "[s]omething demanded or required as a prerequisite to the granting or performance of something else"; "a restriction, qualification, or limitation"); *see also* 17 *id.* at 800 ("terms" means "[c]onditions or stipulations limiting what is proposed to be granted or done"; "a condition or prerequisite *of* something").

It is undisputed that when a national bank makes a mortgage loan directly (rather than through an operating subsidiary), its activities are supervised and regulated exclusively by the OCC, and are not subject to state permission or supervision. *See* 12 U.S.C. §§ 36(f), 93, 371(a), 484, 1818(b). Under Michigan law, however, when a national bank conducts mortgage lending through an operating subsidiary, its activities become subject to State registration, supervision, regulation and enforcement.[13] Requiring an operating subsidiary to

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[13] *See* Mich. Comp. Laws §§ 445.1652(1), .1656(1)(d), .1657, .1658, .1661, .1665-.1666, .1671, .1679(1)(a), 493.52(1), .53a(d), .54, .55(4), .56a-b, .58-.59, .61-62a.

obtain licenses from as many as 50 States (and any number of city and county governments) is not the same licensing "terms and conditions" as requiring a national bank to obtain a single license from the OCC. Similarly, requiring examination and supervision by 50 States and numerous local governments is not the same regulatory "terms and conditions" as requiring examination and supervision by a single federal agency. Petitioner's argument, if accepted, would permit States to apply their own substantive standards to national bank activities conducted through operating subsidiaries. *See, e.g., Nat'l City Bank of Ind.* v. *Turnbaugh*, 463 F.3d 325, 328-29 (4th Cir. 2006) (seeking to impose on operating subsidiaries a State restriction on mortgage prepayment fees that does not apply to national banks).

In short, Michigan's laws interfere with the exercise of national bank powers. Whether the interference is viewed as occurring at the parent or the subsidiary level, Michigan's laws are preempted.

5. The OCC's Exclusive Visitorial Authority Under Section 484 Is Among The "Terms And Conditions" Applicable To National Bank Activities Conducted Through Operating Subsidiaries.

Section 484 of Title 12 was enacted as part of the original National Bank Act in 1864 because of concern that States would target national banks with "unfriendly legislation" just as they had targeted the Bank of United States in *McCulloch*. *See supra* pp. 2-3 & n.1.[14] Section

[14] Section 484 is but one of the National Bank Act's provisions protecting against possible state interference. Congress also, for example, provided a federal formula constraining state limits on national bank interest rates and provided an exclusive federal remedy for usury claims against national banks. Act of 1864, ch. 106, § 30, 13 Stat. 99, 108 (1864); 12 U.S.C. §§ 85, 86. (...continued)

484 limits States' exercise of "visitorial powers" over national banks, providing that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or . . . directed by Congress." 12 U.S.C. § 484(a).[15]

Visitation, as this Court recognized in *Guthrie* v. *Harkness*, concerns "examin[ation]" into the "manner of conducting business," *i.e.*, visitation is focused on national banks' activities. 199 U.S. 148, 157-59 (1905) ("Visitation" is "the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations.") (internal quotation marks omitted). As the OCC's "visitorial powers" regulation confirms, visitorial powers include "[e]xamination of a bank," "[i]nspection of a bank's books and records," "[r]egulation and supervision of activities authorized or permitted pursuant to federal banking law," and "[e]nforcing compliance with any applicable federal or state laws *concerning those activities*." 12 C.F.R. § 7.4000(a)(2) & (3) (emphasis added). *See also* Pet. Br. 12 ("Visitorial powers include the examination and inspection of a national bank's books and records, as well as the enforcement of laws applicable to *a national bank's operations*") (emphasis added).

"Uniform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from 'possible unfriendly State legislation.'" *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 10-11 (2003) (citations omitted).

[15] Section 484(b) provides a limited exception "to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws." 12 U.S.C. § 484(b).

Section 484 contributes to the development and maintenance of a unitary national banking system by providing that the OCC is the exclusive supervisor of a national bank's federally-authorized banking activities except as provided by federal law. Importantly, pursuant to Section 484 the OCC enforces national banks' compliance with non-preempted *state* laws as well as federal laws. *See* 12 C.F.R. § 7.4000(a)(2); *see also* 12 U.S.C. § 36(f)(1)(A) & (B) ("The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of interstate branches" that are not preempted by federal law "shall be enforced, with respect to such branch, by the Comptroller of the Currency."); 12 U.S.C. § 1818(b)(1) (authorizing the OCC to enforce the provisions of any "law, rule, or regulation"); *Nat'l State Bank* v. *Long*, 630 F.2d 981, 987-88 (3d Cir. 1980). The same policy of uniform regulation and supervision of national bank activities, and the same concerns about possible state interference, arise whether the national bank is exercising its powers directly or though an operating subsidiary.

Petitioner argues, however, that Section 484's language (Pet. Br. 12-17) provides that operating subsidiaries of national banks are subject to state visitorial powers. Section 484 does no such thing. The provision restricts the exercise of visitorial powers by the States; it is not an affirmative grant of authority to the States. Section 484 is silent as to operating subsidiaries, but that silence is hardly surprising. Operating subsidiaries did not come in existence until 100 years after the enactment of Section 484. Thus, the 1864 Congress expressed no intent (let alone an "unambiguous" intent) to allow States to exercise visitorial authority over operating subsidiaries by failing to mention them in Section 484. Moreover, as discussed above, the exercise of visitorial power relates to the examination and supervision of national bank *activities*, whether carried out directly by the bank or through a subsidiary. *See* 12

C.F.R. § 7.4000(a)(3). Consequently, Section 484 does not support Petitioner's contention that States may regulate and supervise a national bank's activities when exercised through an operating subsidiary.

Petitioner also relies on 12 U.S.C. § 481, which authorizes the OCC to examine "affiliates" of national banks, 12 U.S.C. § 481, and notes that the definition of "affiliate" in 12 U.S.C. § 221a(b) includes operating subsidiaries. Pet. Br. 13, 14, 22. Petitioner argues that if Congress had intended to limit States' visitorial power over operating subsidiaries, it would have written Section 484 to apply not only to national banks but also to their "affiliates." *See id.* Petitioner's argument is unpersuasive for several reasons.

First, as noted above, neither the 1864 Congress that enacted Sections 481 and 484, nor the 1933 Congress that added the provisions regarding the examination of affiliates to Section 481 and the definition of "affiliate" in Section 221a, can be assumed to have had any intention as to the applicability of those laws to operating subsidiaries, which were not authorized until 1966. *See United Dominion Indus., Inc.* v. *United States*, 532 U.S. 822, 836 (2001) ("soundness" of the canon *expressio unius est exclusio alterius* "is a function of timing").

Second, the term "affiliate" covers many types of affiliates, including some that Congress *has* subjected to State visitorial powers. For example, the definition of "affiliate" in Section 221a(b) includes subsidiaries of a bank holding company that are authorized to engage in a wide range of financial activities, including non-banking activities that national banks (and their subsidiaries) are not authorized to conduct. *See* 12 U.S.C. § 1843(k). Such entities are subject to State regulation in connection with those activities.

Third, Sections 481 and 484 must be interpreted together with other provisions of federal banking law. *See*

U.S. Nat'l Bank of Or. v. *Indep. Ins. Agents of Am.*, 508 U.S. 439, 454 (1993) ("[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy") (quoting *United States* v. *Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)). GLBA addressed the relationship among banks, affiliates and subsidiaries. Congress affirmatively provided that the *banking* activities of operating subsidiaries are subject to the same "terms and conditions" as the parent national bank, 12 U.S.C. § 24a, which include exclusive visitorial authority of the OCC, 12 U.S.C. § 484(a). At the same time, GLBA provided that States have authority to supervise *non-banking activities* such as securities and insurance activities. *See* 12 U.S.C. § 1844(c)(4); *see also, e.g.*, 12 U.S.C. §§ 1820a(c) & 1831v (applying the standards of Section 1844 to all federal banking agencies); 15 U.S.C. § 6701(b) (providing that "any person" who sells insurance must obtain a state license to do so). The relevant statutory provisions, considered as a whole, provide that States may not exercise visitorial authority over national bank operating subsidiaries through which national banks exercise their federal lending powers pursuant to a license granted by the OCC.

For the same reasons, the Court's decisions in *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924), and *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 371-73 (1986), do not support Petitioner. In *First National Bank in St. Louis*, the Court held that national banks' incidental powers did not include the power to establish branches, because such an incidental power conflicted with other provisions of federal law authorizing national banks to operate branches only in limited circumstances. Here, in contrast, the incidental power to conduct banking activities through operating subsidiaries does not conflict with Section 484 or other provisions of federal law, and

was recognized by Congress in GLBA, 12 U.S.C. § 24a(g)(3)(A).

Likewise, in *Dimension Financial*, the Federal Reserve Board adopted a definition of "bank" that conflicted with the plain statutory language. 474 U.S. at 367-68. In this case, in contrast, the OCC has not redefined the term "national bank" in Section 484. Instead, it has determined that a national's bank's incidental powers under Section 24 Seventh include the power to conduct federally-authorized banking activities through an operating subsidiary, subject to the same authorization, terms, and conditions as the bank, which includes visitation solely by the OCC. 12 C.F.R. § 5.34(e)(3). Congress recognized the same power in GLBA. *See* 12 U.S.C. § 24a(g)(3)(A).

Petitioner also attempts to draw support from the Alternative Mortgage Transaction Parity Act of 1982, Pub. L. No. 97-320, title VIII, § 803, 96 Stat. 1545 (the "Parity Act"), but that statute does not apply here. The Parity Act "eliminate[d] the discriminatory impact" on state chartered institutions that resulted from federal regulations "authorizing federally chartered depository institutions to engage in alternative mortgage financing." 12 U.S.C. § 3801(b).[16]

Preemption under the Parity Act is conditioned upon the requirement that state-chartered housing creditors maintain state licenses, *see* 12 U.S.C. § 3802.

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[16] The Senate report accompanying the Parity Act explained that for purposes of the Act, operating subsidiaries of state banks were to be treated the same as the parent bank. S. Rep. No. 97-463, at 55 (1982) ("Recognizing traditional industry lines," Congress noted that the Parity Act "authorizes [state] commercial banks, *including their subsidiaries*, to engage in transactions in accordance with regulations of the Comptroller of the Currency . . . .") (emphasis added).

But that condition does not apply to national banks and their operating subsidiaries, which look to the National Bank Act rather than the Parity Act for preemption of state laws regarding adjustable-rate mortgages. *See* 12 U.S.C. § 371; 12 C.F.R. §§ 34.1(b) & 34.21.[17] To the extent it is relevant to this case, the Parity Act demonstrates that Congress is not averse to preempting state banking laws, even as applied to state-chartered banks.

B. Michigan's Laws Are Also Preempted Under The OCC's Regulations.

1. Michigan's Laws Conflict With The OCC's Regulations.

Michigan's laws conflict not only with the provisions of the National Bank Act, but also with the OCC's regulations interpreting and implementing those provisions. *First*, Michigan's laws conflict with the OCC's operating subsidiary regulation, which provides that national banks conduct federally-authorized banking activities through an operating subsidiary pursuant to the "same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. § 5.34(e)(3). As discussed above, pp. 18-20, the "same terms and conditions" language was adopted by the OCC after Congress used that language in GLBA to describe operating subsidiaries. As also discussed above,

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[17] The Office of Thrift Supervision also recognizes that subsidiaries of federal thrifts do not fall under the scope of the Parity Act, but rather enjoy preemption of state laws regarding ARM loans by virtue of the OTS regulations governing the operations of federal savings associations. *See* 67 Fed. Reg. 60,542, 60,550 (Sept. 26, 2002) ("Because operating subsidiaries of federal savings associations have the same lending authority and benefits of federal preemption, they do not need to use AMPTA to preempt state law.").

pp. 25-26, Michigan's laws conflict with this provision by subjecting a national bank's mortgage lending activities to state registration, supervision and enforcement when they are conducted through an operating subsidiary rather than directly by the national bank.

Second, Michigan's laws conflict with 12 C.F.R. § 7.4006, which provides that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank," 12 C.F.R. § 7.4006. The OCC has explained that Section 7.4006 follows directly from the principle, recognized in both GLBA and the OCC's operating subsidiary regulation, that national bank activities are governed by the "same terms and conditions," whether they are conducted directly or through an operating subsidiary. 66 Fed. Reg. 34,784, 34,788 (July 2, 2001). Section 7.4006 confirms that preemption of state law depends upon the nature of the national bank activity at issue, not the corporate entity through which the activity is carried out.

Third, Michigan's laws conflict with the OCC's real estate lending regulations. Congress has provided that national banks may engage in real estate lending "subject to . . . such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371(a). Section 371(a) subjects real estate lending by national banks to restrictions and requirements imposed by the OCC, not state law.[18] Pursuant to this grant of rulemaking authority, the OCC has determined that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its

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[18] Before it enacted the current version of Section 371(a), Congress imposed detailed requirements for real estate lending by national banks. *See* 12 U.S.C. § 371(a) (1976). At no point has Congress provided that States may impose additional or contrary requirements on real estate lending by national banks.

Federally authorized real estate lending powers do not apply to national banks." 12 C.F.R. 34.4(a). The regulations specify, in particular, that state "registration" requirements are preempted. 12 C.F.R. § 34.4(a)(1) ("[A] national bank may make real estate loans . . . without regard to state law limitations concerning . . . "[l]icensing" and "registration"). Michigan's mortgage-lending registration regime, under which Petitioner may deny or suspend registration, *see* Mich. Comp. Laws § 445.1665(1), imposes just such requirements on operating subsidiaries of national banks, in direct conflict with the OCC's regulations. The OCC has expressly provided that the regulations "appl[y] to national banks and their operating subsidiaries." 12 C.F.R. § 34.1(b). Accordingly, Michigan's laws also directly conflict with the OCC's real estate lending regulations.

Each of the OCC's rules is a "full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation." *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996). Under well-established principles, the OCC's regulations preempt Michigan's laws regulating mortgage lending by operating subsidiaries.[19]

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[19] Petitioner does not dispute that the OCC's operating subsidiary and real estate lending regulations are legislative rules. Section 7.4006, by its terms, is also a legislative rule. In evaluating the federalism implications of Section 7.4006 for purposes of Executive Order No. 13,132, the OCC stated that Section 7.4006 "itself does not effect preemption," but that statement reflected the OCC's determination that state law was already preempted under the operating subsidiary rule and GLBA. *See* 66 Fed. Reg. 34,784, 34,790 (July 2, 2001). The OCC noted that, in the event Section 7.4006 did broaden the preemptive scope of pre-existing regulations, the agency had complied with Executive Order No. 13,132. *Id.* at 34,790. (...continued)

2. The OCC's Regulations Have The Same Preemptive Effect As Federal Statutes.

It is well settled that "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). Agency rules with the force of law are "Laws of the United States" for purposes of the Supremacy Clause, U.S. Const. art. VI, cl. 2. *See City of New York* v. *FCC*, 486 U.S. 57, 63 (1988) ("The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.").

In *de la Cuesta*, the Court held that a regulation of the Federal Home Loan Bank Board permitting federal savings and loans associations to include due-on-sale clauses in mortgage contracts preempted a state law prohibiting such clauses. The Court stated that "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law," and thus a "narrow focus on Congress' intent to supersede state law" is "misdirected." 458 U.S. at 154. "Rather," the Court held that the relevant questions are "whether the [agency] meant to pre-empt California's due-on-sale law, and, if so, whether that action is within the scope of the [agency's] delegated authority." *Id.* The Court has confirmed these principles of regulatory preemption many times. *See, e.g., U.S.* v. *Locke*, 529 U.S. 89, 109-10 (2000);

Moreover, the Comptroller has affirmed that Section 7.4006 has preemptive effect. *See* U.S. Br. in *Burke* v. *Wachovia Bank, N.A.*, No. 05-431, at 9 n.4. An agency's interpretation of its own regulation is "controlling" unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997) (internal quotation and citation omitted).

City of New York v. *FCC*, 486 U.S. 57 (1988); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700-05 (1984); *Blum* v. *Bacon*, 457 U.S. 132, 141-442 (1982).

Although express congressional authorization to displace state law is unnecessary under *de la Cuesta*, here Congress *has* recognized the OCC's authority to preempt state law. Congress has directed the OCC to follow notice and comment procedures "[b]efore issuing any opinion letter or interpretive rule . . . that concludes that Federal law preempts the application to any national bank of any State law regarding community reinvestment, consumer protection, fair lending or . . . intrastate branches." 12 U.S.C. § 43(a). This requirement necessarily assumes OCC authority to make preemption determinations.

Petitioner's *amici* incorrectly argue that, as part of the *de la Cuesta* analysis, "the court must inquire whether Congress has expressly provided for preemption." Center for State Enf. Br. 27. The Court rejected precisely that argument in *de la Cuesta* and subsequent cases. *See de la Cuesta*. 458 U.S. at 154 ("narrow focus on Congress' intent to supersede state law" is "misdirected"). *See also* Br. of Richard J. Pierce, *et al.*, 4-10. "[I]f the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *City of New York*, 486 U.S. at 64 (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)).

3. The OCC's Regulations Are Within The Scope Of Its Rulemaking Authority.

The OCC's regulations are within the scope of the Comptroller's delegated rulemaking authority under 12 U.S.C. §§ 93a and 371(a). Section 93a provides:

> "Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority conferred in this section does not apply to section 36 of this title or to securities activities of National Banks under the Act commonly known as the 'Glass-Steagall Act.'"

12 U.S.C. § 93a. This statutory language confers unusually broad rulemaking authority on the Comptroller. *First*, the Comptroller's rulemaking authority is not confined to a particular statute, but instead "is as broad as the OCC's statutory responsibilities." *Wells Fargo Bank, N.A.* v. *Boutris*, 419 F.3d 949, 958 (9th Cir. 2005) (citations omitted). *See also Conference of State Bank Supervisors* v. *Conover*, 710 F.2d 878, 883 (D.C. Cir. 1983) (per curiam). *Second*, the OCC's authority is limited only if rulemaking authority has been both "expressly" and "exclusively" conferred on another regulatory agency. 12 U.S.C. § 93a. *Third*, the two specific exceptions to the OCC's rulemaking authority (for national bank branching and securities activities) emphasize the breadth of the OCC's rulemaking authority in other areas. The statutory language itself thus contradicts the argument by some of Petitioner's amici that Section 93a is a very limited grant of rulemaking authority. *See* States' Br. 11-15; NAR Br. 19-20.[20]

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[20] The OCC has promulgated many critical banking regulations pursuant to its rulemaking authority under Section 93a. *See, e.g.*, 12 C.F.R. Part 3 (capital requirements); *id.* Part 6 (authority to order "prompt corrective action" by a potentially

(...continued)

Here, Section 93a's broad grant of rulemaking authority is reinforced by the specific grant of rulemaking authority in Section 371(a) for real estate lending. National banks engage in real estate lending "subject to . . . such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371(a). Prior to conferring this broad rulemaking authority on the Comptroller, Congress itself specified the restrictions on national banks' real estate lending. *See* p. 33 n. 18, *supra*. The 1982 amendments that adopted the current version of § 371(a) granted broad authority to the OCC, not the States, to determine applicable restrictions on the conduct of these activities. *See* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 403(a), 96 Stat. 1469, 1510 (1982).

The Court's decision in *Gonzales* v. *Oregon*, 126 S. Ct. 904 (2006), does not support Petitioner. The Comptroller's rulemaking authority under Section 93a is much broader than the Attorney General's "narrowly defined delegation" under the Controlled Substances Act to promulgate rules "relating to the registration and control of the manufacture, distribution, and dispensing" of controlled substances. *Gonzales*, 126 S. Ct. at 917, 920. The grant of rulemaking authority in Section 93a is more like the broad grant of authority in the Federal Communications Act to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act. *See Gonzales*, 126 S. Ct. at 916 (quoting 47 U.S.C. § 201(b)). In *Gonzales*, moreover, the Court found no statutory support for the

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failing institution); *id.* Part 16 (registration and disclosure requirements for securities); *id.* Part 23 (standards for personal property lease transactions); *id.* Part 37 (standards for debt cancellation and suspension contracts). The cramped interpretation of Section 93a offered by Petitioners' amici would call into question the validity of these regulations.

Attorney General's exercise of rulemaking authority to determine appropriate medical standards. 126 S. Ct. at 917-21. Here, in contrast, Congress has recognized that operating subsidiaries of national banks engage in federally-authorized banking activities subject to the "same terms and conditions" as the parent bank. 12 U.S.C. § 24a(g)(3)(A).

4. The OCC's Interpretation Of The National Bank Act Is Entitled To *Chevron* Deference.

The Court has held repeatedly that the OCC's interpretations of provisions of the National Bank Act are entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). In *NationsBank* v. *Variable Annuity Life Ins. Co.*, the Court gave *Chevron* deference to the OCC's determination that a national bank's incidental powers under Section 24 Seventh include the power to act as an agent in the sale of annuities through an operating subsidiary. *See* 513 U.S. at 254, 256-57. The Court stated:

> "It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws."

NationsBank, 513 U.S. at 256-57 (internal quotation marks and citations omitted). *See also Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739-42 (1996) (according *Chevron* deference to Comptroller's interpretation of the National Bank Act); *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 403-09 (1987) (same). The

OCC's interpretations at issue in this case are embodied in notice-and-comment rules, but the Court has recognized, under "longstanding precedent," that the "rule of deference" applies to the Comptroller's "deliberative conclusions as to the meaning of [the banking] laws" even in the absence of notice-and-comment rulemaking. *United States* v. *Mead Corp.*, 533 U.S. 218, 231 & n.13 (2001).

Petitioner's contention (Pet. Br. 28-38) that the *Chevron* doctrine does not apply to this case is thus clearly incorrect.[21] The Comptroller's determination that national banks may conduct their federally-authorized banking activities through operating subsidiaries, subject to the same terms and conditions that apply when those activities are conducted by the bank itself, is an interpretation of the incidental powers of national banks under 12 U.S.C. § 24 Seventh, and it is plainly reasonable. *See* 12 U.S.C. § 24a(g)(3)(A) (operating subsidiaries conduct activities pursuant to the "same terms and conditions" as the parent bank). The Comptroller's determination is therefore entitled to *Chevron* deference under decisions such as *NationsBank*, *Smiley*, and *Clarke*.

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[21] In the courts below, Petitioner did not dispute that the *Chevron* doctrine applies to this case. In the district court, she acknowledged that *Chevron* applies and argued that the statutory language is ambiguous (*i.e.*, that this is a *Chevron* "Step Two" case). Defs.' Opp'n to Pls.' Mot. for Summ. J., at 8 (Feb. 20, 2004) (R.46). In the court of appeals, she argued that the statutory language is unambiguous, but continued to acknowledge that *Chevron* applies (*i.e.*, she argued that this is a *Chevron* "Step One" case). Pet. C.A. Br. at 17 (Apr. 12, 2005). In neither court did she argue that *Chevron* does not apply. Arguments not raised in either court below generally cannot be raised for the first time on appeal. *See Glover* v. *United States*, 531 U.S. 198, 205 (2001).

In *Smiley*, the Court distinguished between "the question of the substantive . . . *meaning* of a statute" and "the question of *whether* a statute is pre-emptive." 517 U.S. at 744. The Court answered the first question by deferring under *Chevron* to the OCC's interpretation of the term "interest" in 12 U.S.C. § 85. Because there was a clear conflict between state law and the National Bank Act (as reasonably interpreted by the OCC), the Court found it unnecessary to decide whether the Comptroller's answer to the second question (whether the statute is preemptive) also receives *Chevron* deference. *See Smiley*, 517 U.S. at 744.

The same analysis applies in this case. As we have shown, pages 15-32, *supra*, the OCC's interpretation of the incidental powers of national banks under Section 24 Seventh is reasonable. Moreover, Michigan's laws plainly conflict with the National Bank Act and the OCC's regulations by subjecting national banks' mortgage lending through an operating subsidiary to state examination, supervision, and regulation. *See* pp. 21-26, *supra*. Accordingly, the Court can decide this case, as it decided *Smiley*, without resolving the question whether agency preemption determinations are entitled to *Chevron* deference.[22]

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[22] One of Petitioner's amici acknowledges that *Chevron* applies to the OCC's interpretation of the National Bank Act, but argues that "if the agency asks the court to defer to its judgment that displacement [of state law] is required, all steps in the chain of logic that lead to this conclusion should be reviewed under the standard of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Ctr. for State Enf. Br. 19-20. This contradicts the Court's decision in *Smiley*, which deferred to the Comptroller's interpretation of the National Banking Act notwithstanding the Comptroller's determination that federal law displaced state law. In many cases (including *Smiley* and this case), determining the substantive meaning of the federal statute effectively answers the question whether federal law is (...continued)

If the Court reaches that question, however, it should begin with its prior decisions holding that agency preemption determinations are entitled to substantial deference. The Court has recognized that federal agencies have special expertise in determining whether a state law conflicts with the purposes of a federal law administered by the agency, and therefore "the agency is uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 496 (1996) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). "The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements." *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000). In such circumstances, "the agency's own views [on preemption] should make a difference" *Id.* (citation omitted). *See also id.* at 912 n.25 (Stevens, J., dissenting) (noting that Court defers to agency's interpretation of authority to issue preemptive regulations "as formally expressed through . . . explicitly pre-emptive regulations").[23]

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preemptive. Moreover, if agencies knew that they would be stripped of *Chevron* deference to their statutory interpretations by making a judgment that displacement of state law is required, they would have an incentive to avoid expressing such judgments, even though agencies are "uniquely qualified" to determine the likely impact of state laws on a federal regulatory scheme. *See Geier* v. *Am. Honda Motor Co.*, 529 U.S. at 883-84 (2000).

[23] In GLBA, Congress legislated against the background of what it termed "OCC Deference," *see* 15 U.S.C. § 6701(d)(2)(C)(i), regarding the OCC's preemption determinations concerning state insurance laws. Congress specified that courts shall not accord "unequal deference" to the OCC's preemption determinations concerning certain insurance activities if the (...continued)

Ultimately, a determination that a state law conflicts with federal law is, in large part, a policy determination. Under the rationale of *Chevron*, such determinations should be made by a politically-responsible branch of the government. *See Chevron*, 467 U.S. at 843-45. *See also* Br. of Richard J. Pierce, *et al.*, 14-19.

Petitioner and her amici assert that federal agencies do not give sufficient weight to federalism concerns, but it is by no means apparent that that this is so. States may participate in the notice-and-comment rulemaking process, as Michigan did in connection with some of the OCC rules at issue in this case.[24] In addition, agencies are hardly impervious to federalism concerns registered through elected officials. Congress holds agency oversight hearings and enacts legislation. Congress has actively monitored the OCC's preemption determinations, enacting both Section 43 (concerning the agency's procedures for issuing such determinations) and 15 U.S.C. §§ 6701(d)(2)(C)(i) & 6714(e) (concerning the degree of deference that courts should afford to such determinations when they relate to state insurance laws). Moreover, the Comptroller is appointed (and may be removed) by the President, and OCC rules are reviewed by the Office of Management and Budget within the

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state insurance law at issue was adopted on or after September 3, 1998, *id.* § 6714(e), but made this "unequal deference" provision inapplicable to state insurance laws adopted prior to that date, *id.* § 6701(d)(2)(C)(i). Congress thus contemplated that, except where expressly withheld by Section 6714(e), the OCC would receive deference in making preemption determinations regarding state insurance laws.

[24] *See, e.g.*, Letter from Linda A. Watters to John D. Hawke, Jr. (Oct. 3, 2003) (available at <www.michigan.gov/documents/Final_OFIS_Letter_10-3-031_75214_7.pdf>).

Executive Office of the President. *See* 12 U.S.C. § 2; Executive Order No. 13,132, 3 C.F.R. § 206 (2000).

II. Petitioner's Corporate Law And State Sovereignty Arguments Lack Merit.

A. The OCC's Exclusive Regulation Of National Banking Activities Conducted Through Operating Subsidiaries Is Consistent With Corporate Law Principles.

The OCC treats national bank operating subsidiaries as "incorporated departments or divisions of the bank" for regulatory purposes. 66 Fed. Reg. 34,784, 34,788 (July 2, 2001). National banks and their operating subsidiaries must submit consolidated financial statements to the OCC, and regulatory limits on lending and investment in bank premises are applied to the bank and its operating subsidiaries on a consolidated basis. *See* 12 C.F.R. § 5.34(e)(4). In addition, operating subsidiaries are treated as part of the parent bank for purposes of provisions governing national banks' transactions with their affiliates. *See* 12 U.S.C. § 371c(b)(2)(A).

Contrary to Petitioner's assertions (Pet. Br. 17-20), these federal regulatory requirements do not violate the principle of "corporate separateness." "Affiliated corporations, particularly a parent corporation and its subsidiaries, often prepare a consolidated financial statement or balance sheet, the purpose of which is to show their overall financial condition as a single organization or economic unit." 19 William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 4.07 (6th ed. 2000). Moreover, treating an operating subsidiary as a part of the parent bank for federal regulatory purposes does not violate principles of corporate separateness. The OCC has stated that the formation, dissolution, and corporate governance of operating subsidiaries are governed by the law of the

chartering State, rather than federal law. "States do have jurisdiction over operating subsidiaries for matters concerning the corporate existence or corporate governance of operating subsidiaries." *Special Interest – On Preemption and Visitorial Powers*, 23-1 OCC QJ 21 (available at 2004 OCC QJ LEXIS 32 at *205). The OCC's regulations thus preserve the separate corporate identity of Wachovia Mortgage under the law of the chartering State (North Carolina, not Michigan).[25]

For this reason, Petitioner's reliance on *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), and *United States* v. *Bestfoods*, 524 U.S. 51 (1998) is misplaced. In those cases, the Court interpreted federal statutory provisions in the light of basic corporate law principles. In this case, in contrast, the OCC's regulation of the banking activities of operating subsidiaries is entirely consistent with basic tenets of corporate law, including the principle of corporate separateness.

Rather than seeking to regulate every aspect of national bank operating subsidiaries, the OCC regulates only their federally authorized banking activities. Such federal regulation of activities of state-chartered corporations is common and does not violate corporate law principles. *See* 14 William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 6672 (6th

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[25] Because Wachovia Mortgage is a North Carolina corporation, Michigan cannot claim to possess regulatory authority as the chartering jurisdiction. ~~Michigan's~~ laws, by their terms, do not apply to national bank operating subsidiaries when the parent national bank has a branch in Michigan. Mich. Comp. Laws §§ 445.1652(1)(b), 445.1675(m), 493.53a(d). This feature of Michigan's law contradicts Petitioner's argument (Pet. Br. 25 & n.87) that Michigan views the OCC's regulation of operating subsidiaries as inadequate. The OCC's regulation of national bank operating subsidiaries is exactly the same, whether or not the parent bank has a branch in Michigan.

ed. 2000) ("The power of the federal government to regulate and control corporations is derived primarily from the constitutional power vested in Congress to regulate commerce."). There are many examples of corporate activities that are exclusively regulated by federal agencies: When a state-chartered corporation broadcasts television or radio signals, operates a nuclear power plant, seeks patent protection for an invention, or engages in collective bargaining with its employees, its activities are regulated by a federal agency applying federal law.[26] Such regulation is entirely consistent with corporate law principles.

B. The OCC's Exclusive Regulation Of National Banks' Activities Conducted Through Operating Subsidiaries Is Permissible Under The Tenth Amendment.

There is also no merit to Petitioner's argument (Pet. Br. 39-44) that the Tenth Amendment prohibits the OCC's exclusive supervision of the banking activities of national bank operating subsidiaries. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York* v. *United States*, 505 U.S. 144, 156 (1992). Regulation of mortgage lending (and

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[26] *See, e.g.*, 47 U.S.C. §§ 303, 304 & 307 (FCC has exclusive authority to license radio and television broadcasting); *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (federal government exclusively regulates "the radiological safety aspects involved in the construction and operation of a nuclear plant"); *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 152-53 (1989) (corporation receives patent protection exclusively from federal law); *San Diego Bldg. Trades Council, Millmen's Union, Local 2020* v. *Garmon*, 359 U.S. 236, 241-45 (1959) (NLRB jurisdiction to determine permissible conduct under the National Labor Relations Act).

other banking activities) falls squarely within Congress's power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. As this Court has held, "[n]o elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause." *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 58 (2003) (per curiam).

This is not a case in which the federal government seeks to "commandeer" state officials to carry out a federal program. To the contrary, the OCC has undertaken the task of regulating the federally-authorized banking activities conducted by national banks through their operating subsidiaries. Accordingly, the "anti-commandeering" principle recognized in cases such as *New York* and *Printz* v. *United States*, 521 U.S. 898 (1997), has no application here.

Petitioner nevertheless argues that the OCC's regulations violate the Tenth Amendment by "federalizing" state-chartered corporations. Pet. Br. 39-44. As already noted, Wachovia Mortgage is a North Carolina corporation, not a Michigan corporation. Consequently, Petitioner cannot argue that the OCC's regulation of Wachovia Mortgage's lending activities infringes Michigan's chartering authority. Furthermore, Petitioner's assertion that the OCC has "federalized" a state corporation is simply incorrect. The OCC's regulations do not "convert" state-chartered corporations into federally-chartered corporations. As noted above, *see* p. 45, the OCC expressly disclaims authority to regulate the formation, dissolution, and corporate governance of operating subsidiaries.[27] The OCC's guidance makes

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[27] Contrary to Petitioner's contention (Pet. Br. 7), Respondents have not challenged Michigan's requirement that foreign (...continued)

clear that only federally-authorized *banking activities* that national banks conduct through their operating subsidiaries are regulated by the OCC. *Id.*

This case is thus quite different from *Hopkins Federal Savings & Loan Association* v. *Cleary*, 296 U.S. 315 (1935), and *Chicago Title & Trust Co.* v. *Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120 (1937). In *Hopkins*, the "critical question" was whether Congress had the power "to put an end to corporations created by the states and turn them into different corporations created by the nation." *Id.* at 336. Rather than merely regulating activities of the state-chartered association, the federal statute at issue in *Hopkins* provided for state associations to be *dissolved*, so that "creatures of the state become creatures of the Nation." *Id.* at 337. The Court held that Congress had impermissibly encroached "upon a domain of activity set apart by the Constitution as the province of the states." *Id.* at 338-39. Here, there is no such encroachment because the OCC does not purport to regulate corporate dissolution.

The issue in *Chicago Title & Trust Co.* was the mirror-image of the issue in *Hopkins*: whether Section 77B of the Bankruptcy Act could be interpreted to have the effect of "breath[ing] life into a corporate entity . . . put to death by the state in the lawful exercise of its sovereign authority." 302 U.S. at 128. The Court's decision rested on the principle that "[h]ow long and upon what terms a state-created corporation may continue to

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corporations obtain a corporate certificate of authority from the Michigan Corporation Division. *See* Mich. Comp. Laws § 450.2011. Such laws may be an aspect of corporate infrastructure that is regulated by the States rather than the OCC. *See* 12 C.F.R. § 34.4(a)(1) (state laws providing for registration for purposes of service of process apply to both national banks and their operating subsidiaries).

exist is a matter exclusively of state power." *Id.* That principle is not implicated here, because the OCC does not regulate the existence or corporate governance of operating subsidiaries.

In sum, the OCC's exclusive supervision and regulation of national banking activities conducted through operating subsidiaries is consistent with *Hopkins* and *Chicago Title*. As noted above (pp. 45-46 & n. 26), exclusive federal regulation of activities of state-chartered corporations is well established. Such regulation is entirely consonant with the design of our federal system, which, through the Supremacy Clause, "gives the Federal Government 'a decided advantage in th[e] delicate balance' the Constitution strikes between state and federal power." *New York*, 505 U.S. at 159 (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991)). Accordingly, there is no Tenth Amendment violation in this case.[28]

For the same reasons, there is no basis for applying the doctrine of "constitutional doubt" or the "clear statement rule" of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), in this case. The "constitutional doubt" doctrine applies only to *serious* constitutional questions. *Reno v. Flores*, 507 U.S. 292, 314 n.9 (2002). Here, there is no question, let alone a "serious" question, that federal

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[28] The Court has upheld federal banking laws that have a far more intrusive effect on the States than the laws at issue in this case. *See, e.g., Missouri ex rel. Burnes Nat'l Bank of St. Joseph* v. *Duncan*, 265 U.S. 17, 23 (1924) (invalidating state limitations on national banks' fiduciary activities in state courts, despite recognition that there is "nothing over which a State has more exclusive authority than the jurisdiction of its courts"); *Van Reed* v. *People's Nat'l Bank of Lebanon*, 198 U.S. 554, 557 (1905) (upholding federal law prohibiting pre-judgment attachment against national banks in state court actions).

regulation of mortgage lending activities is permissible under the Tenth Amendment. Therefore the "constitutional doubt" rule has no application here. Similarly, exclusive federal regulation of corporate activities is well established and does not "upset the usual constitutional balance of federal and state powers." *Gregory* v. *Ashcroft*, 501 U.S. at 460. Consequently, the "clear statement" rule of *Gregory* v. *Ashcroft* does not apply.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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NOVEMBER 3, 2006

APPENDIX

APPENDIX

CONSTITIONAL PROVISIONS INVOLVED

Article VI, clause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

FEDERAL STATUTES INVOLVED

Provisions of the National Bank Act (12 U.S.C.)

§ 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power –

* * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes.

* * *

§ 24a. Financial subsidiaries of national banks

(a) Authorization to conduct in subsidiaries certain activities that are financial in nature

(1) In general

Subject to paragraph (2), a national bank may control a financial subsidiary, or hold an interest in a financial subsidiary.

(2) Conditions and requirements

A national bank may control a financial subsidiary, or hold an interest in a financial subsidiary, only if –

(A) the financial subsidiary engages only in –

(i) activities that are financial in nature or incidental to a financial activity pursuant to subsection (b) of this section; and

(ii) activities that are permitted for national banks to engage in directly (subject to the same terms and

conditions that govern the conduct of the activities by a national bank);

* * *

(5) Regulations required

Before the end of the 270-day period beginning on November 12, 1999, the Comptroller of the Currency shall, by regulation, prescribe procedures to implement this section.

* * *

(g) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate, company, control, and subsidiary

The terms "affiliate", "company", "control", and "subsidiary" have the meanings given those terms in section 1841 of this title.

(2) Appropriate Federal banking agency, depository institution, insured bank, and insured depository institution

The terms "appropriate Federal banking agency", "depository institution", "insured bank", and "insured depository institution" have the meanings given those terms in section 1813 of this title.

(3) Financial subsidiary

The term "financial subsidiary" means any company

that is controlled by 1 or more insured depository institutions other than a subsidiary that –

(A) engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks; or

(B) a national bank is specifically authorized by the express terms of a Federal statute (other than this section), and not by implication or interpretation, to control, such as by section 25 or 25A of the Federal Reserve Act [12 U.S.C.A. §§ 601 et seq., 611 et seq.] or the Bank Service Company Act [12 U.S.C.A. § 1861 et seq.].

* * *

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * *

(f) Law applicable to interstate branching operations

(1) Law applicable to national bank branches

(A) In general

The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws

apply to a branch of a bank chartered by that State, except –

(i) when Federal law preempts the application of such State laws to a national bank; or

(ii) when the Comptroller of the Currency determines that the application of such State laws would have a discriminatory effect on the branch in comparison with the effect the application of such State laws would have with respect to branches of a bank chartered by the host State.

(B) Enforcement of applicable State laws

The provisions of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency.

* * *

§ 43. Interpretations concerning preemption of certain State laws

(a) Notice and opportunity for comment required

Before issuing any opinion letter or interpretive rule, in response to a request or upon the agency's own motion, that concludes that Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches, or before making a determination under section 36(f)(1)(A)(ii) of this title, the appropriate Federal banking agency (as defined in section 1813 of this title) shall –

(1) publish in the Federal Register notice of the preemption or discrimination issue that the agency is considering (including a description of each State law at issue);

(2) give interested parties not less than 30 days in which to submit written comments; and

(3) in developing the final opinion letter or interpretive rule issued by the agency, or making any determination under section 36(f)(1)(A)(ii) of this title, consider any comments received.

(b) Publication required

The appropriate Federal banking agency shall publish in the Federal Register –

(1) any final opinion letter or interpretive rule concluding that Federal law preempts the application of any State law regarding community reinvestment, consumer protection, fair lending, or establishment of intrastate branches to a national bank; and

(2) any determination under section 36(f)(1)(A)(ii) of this title.

(c) Exceptions

(1) No new issue or significant basis

This section shall not apply with respect to any opinion letter or interpretive rule that –

(A) raises issues of Federal preemption of State law that are essentially identical to those previously resolved by the courts or on which the agency has

previously issued an opinion letter or interpretive rule; or

(B) responds to a request that contains no significant legal basis on which to make a preemption determination.

(2) Judicial, legislative, or intragovernmental materials

This section shall not apply with respect to materials prepared for use in judicial proceedings or submission to Congress or a Member of Congress, or for intragovernmental use.

(3) Emergency

The appropriate Federal banking agency may make exceptions to subsection (a) of this section if –

(A) the agency determines in writing that the exception is necessary to avoid a serious and imminent threat to the safety and soundness of any national bank; or

(B) the opinion letter or interpretive rule is issued in connection with –

(i) an acquisition of 1 or more banks in default or in danger of default (as such terms are defined in section 1813 of this title); or

(ii) an acquisition with respect to which the Federal Deposit Insurance Corporation provides assistance under section 1823(c) of this title.

§ 93a. Authority to prescribe rules and regulations

Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority conferred by this section does not apply to section 36 of this title or to securities activities of National Banks under the Act commonly known as the "Glass-Steagall Act".

§ 371. Real estate loans

(a) Authorization to make real estate loans: orders, rules, and regulations of Comptroller of the Currency

Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828*(o)* of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

* * *

§ 481. Appointment of examiners; examination of member banks, State banks, and trust companies; reports

The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every national bank as often as the Comptroller of the Currency shall deem necessary. The examiner making the examination of any national bank shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have

power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency: *Provided,* That in making the examination of any national bank the examiners shall include such an examination of the affairs of all its affiliates other than member banks as shall be necessary to disclose fully the relations between such bank and such affiliates and the effect of such relations upon the affairs of such bank; and in the event of the refusal to give any information required in the course of the examination of any such affiliate, or in the event of the refusal to permit such examination, all the rights, privileges, and franchises of the bank shall be subject to forfeiture in accordance with sections 141, 222 to 225, 281 to 283, 285, 286, 501a and 502 of this title.

* * *

§ 484. Limitation on visitorial powers

(a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

(b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

Provision of the Federal Deposit Insurance Act (12 U.S.C.)

§ 1831v. Authority of State insurance regulator and securities and exchange Commission

(a) In general –

Notwithstanding any other provision of law, the provisions of –

(1) section 1844(c) of this title that limit the authority of the Board of Governors of the Federal Reserve System to require reports from, to make examinations of, or to impose capital requirements on holding companies and their functionally regulated subsidiaries or that require deference to other regulators;

(2) section 1844(g) of this title that limit the authority of the Board to require a functionally regulated subsidiary of a holding company to provide capital or other funds or assets to a depository institution subsidiary of the holding company and to take certain actions including requiring divestiture of the depository institution; and

(3) section 1848a of this title that limit whatever authority the Board might otherwise have to take direct or indirect action with respect to holding companies and their functionally regulated subsidiaries;

shall also limit whatever authority that a Federal banking agency might otherwise have under any statute or regulation to require reports, make examinations, impose capital requirements, or take any other direct or indirect action with respect to any functionally regulated affiliate of a depository institution, subject to the same standards and requirements as are applicable to the

Board under those provisions.

* * *

(c) Definitions

For purposes of this section, the following definitions shall apply:

(1) Functionally regulated subsidiary

The term "functionally regulated subsidiary" has the meaning given the term in section 1844(c)(5) of this title.

(2) Functionally regulated affiliate

The term "functionally regulated affiliate" means, with respect to any depository institution, any affiliate of such depository institution that is –

(A) not a depository institution holding company; and

(B) a company described in any clause of section 1844(c)(5)(B) of this title.

Provision of the Bank Holding Company Act (12 U.S.C.)

§ 1844. Administration

* * *

(c) Reports and examinations

* * *

(4) Functional regulation of securities and insurance activities

(A) Securities activities

Securities activities conducted in a functionally regulated subsidiary of a depository institution shall be subject to regulation by the Securities and Exchange Commission, and by relevant State securities authorities, as appropriate, subject to section 6701 of Title 15, to the same extent as if they were conducted in a nondepository institution subsidiary of a bank holding company.

(B) Insurance activities

Subject to section 6701 of Title 15, insurance agency and brokerage activities and activities as principal conducted in a functionally regulated subsidiary of a depository institution shall be subject to regulation by a State insurance authority to the same extent as if they were conducted in a nondepository institution subsidiary of a bank holding company.

(5) Definition

For purposes of this subsection, the term "functionally regulated subsidiary" means any company –

(A) that is not a bank holding company or a depository institution; and

(B) that is –

(i) a broker or dealer that is registered under the Securities Exchange Act of 1934 [15 U.S.C.A. § 78a et seq.];

(ii) a registered investment adviser, properly registered by or on behalf of either the Securities and Exchange Commission or any State, with respect to the investment advisory activities of such investment adviser and activities incidental to such investment advisory activities;

(iii) an investment company that is registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.];

(iv) an insurance company, with respect to insurance activities of the insurance company and activities incidental to such insurance activities, that is subject to supervision by a State insurance regulator; or

(v) an entity that is subject to regulation by the Commodity Futures Trading Commission, with respect to the commodities activities of such entity and activities incidental to such commodities activities.

* * *

Provisions of the Gramm-Leach-Bliley Act (15 U.S.C.)

§ 6701. Operation of State law

(a) State regulation of the business of insurance

* * *

(b) Mandatory insurance licensing requirements

No person shall engage in the business of insurance in a State as principal or agent unless such person is licensed as required by the appropriate insurance regulator of such State in accordance with the relevant State insurance law, subject to subsections (c), (d), and (e).

* * *

(d) Activities

* * *

(2) Insurance sales

(A) In general

In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County N.A.* v. *Nelson*, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or

crossmarketing activity.

* * *

(C) Limitations

(i) OCC deference

Section 6714(e) of this title does not apply with respect to any State statute, regulation, order, interpretation, or other action regarding insurance sales, solicitation, or cross marketing activities described in subparagraph (A) that was issued, adopted, or enacted before September 3, 1998, and that is not described in subparagraph (B).

* * *

§ 6714. Expedited and equalized dispute resolution for Federal regulators

* * *

(e) Standard of review

The court shall decide a petition filed under this section based on its review on the merits of all questions presented under State and Federal law, including the nature of the product or activity and the history and purpose of its regulation under State and Federal law, without unequal deference.

FEDERAL REGULATIONS INVOLVED

Provisions of the Office of the Comptroller of the Currency Regulations (12 C.F.R.)

§ 5.34 Operating subsidiaries.

(a) Authority. 12 U.S.C. 24 (Seventh), 24a, 93a, 3101 et seq.

(b) Licensing requirements. A national bank must file a notice or application as prescribed in this section to acquire or establish an operating subsidiary, or to commence a new activity in an existing operating subsidiary.

(c) Scope. This section sets forth authorized activities and application or notice procedures for national banks engaging in activities through an operating subsidiary. The procedures in this section do not apply to financial subsidiaries authorized under § 5.39.

* * *

(d) Definitions. For purposes of this § 5.34:

(1) Authorized product means a product that would be defined as insurance under section 302(c) of the Gramm-Leach-Bliley Act (Public Law 106-102, 113 Stat. 1338, 1407) (GLBA) (15 U.S.C. 6712) that, as of January 1, 1999, the OCC had determined in writing that national banks may provide as principal or national banks were in fact lawfully providing the product as principal, and as of that date no court of relevant jurisdiction had, by final judgment, overturned a determination by the OCC that national banks may provide the product as principal. An

authorized product does not include title insurance, or an annuity contract the income of which is subject to treatment under section 72 of the Internal Revenue Code of 1986 (26 U.S.C. 72).

(2) Well capitalized means the capital level described in 12 CFR 6.4(b)(1) or, in the case of a Federal branch or agency, the capital level described in 12 CFR 4.7(b)(1)(iii).

(3) Well managed means, unless otherwise determined in writing by the OCC:

(i) In the case of a national bank:

(A) The national bank has received a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System in connection with its most recent examination; or

(B) In the case of any national bank that has not been examined, the existence and use of managerial resources that the OCC determines are satisfactory.

* * *

(e) Standards and requirements –

(1) Authorized activities. A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking, as determined by the OCC, or otherwise under other statutory authority, including:

(i) Providing authorized products as principal; and

(ii) Providing title insurance as principal if the national bank or subsidiary thereof was actively and lawfully underwriting title insurance before November 12, 1999, and no affiliate of the national bank (other than a subsidiary) provides insurance as principal. A subsidiary may not provide title insurance as principal if the state had in effect before November 12, 1999, a law which prohibits any person from underwriting title insurance with respect to real property in that state.

(2) Qualifying subsidiaries. An operating subsidiary in which a national bank may invest includes a corporation, limited liability company, or similar entity if the parent bank owns more than 50 percent of the voting (or similar type of controlling) interest of the operating subsidiary; or the parent bank otherwise controls the operating subsidiary and no other party controls more than 50 percent of the voting (or similar type of controlling) interest of the operating subsidiary. However, the following subsidiaries are not operating subsidiaries subject to this section:

(i) A subsidiary in which the bank's investment is made pursuant to specific authorization in a statute or OCC regulation (e.g., a bank service company under 12 U.S.C. 1861 et seq. or a financial subsidiary under section 5136A of the Revised Statutes (12 U.S.C. 24a)); and

(ii) A subsidiary in which the bank has acquired, in good faith, shares through foreclosure on collateral, by way of compromise of a doubtful claim, or to avoid a loss in connection with a debt previously contracted.

(3) Examination and supervision. An operating subsidiary conducts activities authorized under this

section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank. If, upon examination, the OCC determines that the operating subsidiary is operating in violation of law, regulation, or written condition, or in an unsafe or unsound manner or otherwise threatens the safety or soundness of the bank, the OCC will direct the bank or operating subsidiary to take appropriate remedial action, which may include requiring the bank to divest or liquidate the operating subsidiary, or discontinue specified activities. OCC authority under this paragraph is subject to the limitations and requirements of section 45 of the Federal Deposit Insurance Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act (12 U.S.C. 1820a).

(4) Consolidation of figures –

(i) National banks. Pertinent book figures of the parent national bank and its operating subsidiary shall be combined for the purpose of applying statutory or regulatory limitations when combination is needed to effect the intent of the statute or regulation, e.g., for purposes of 12 U.S.C. 56, 60, 84, and 371d.

* * *

(5) Procedures –

(i) Application required.

(A) Except as provided in paragraph (e)(5)(iv) or (e)(5)(vi) of this section, a national bank that intends to acquire or establish an operating subsidiary, or to perform a new activity in an existing operating subsidiary, must first submit an

application to, and receive approval from, the OCC. The application must include a complete description of the bank's investment in the subsidiary, the proposed activities of the subsidiary, the organizational structure and management of the subsidiary, the relations between the bank and the subsidiary, and other information necessary to adequately describe the proposal. To the extent the application relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity that the company is engaged in and has present plans to conduct. The bank must also list for each state the lines of business for which the company holds, or will hold, an insurance license, indicating the state where the company holds a resident license or charter, as applicable. The application must state whether the operating subsidiary will conduct any activity at a location other than the main office or a previously approved branch of the bank. The OCC may require the applicant to submit a legal analysis if the proposal is novel, unusually complex, or raises substantial unresolved legal issues. In these cases, the OCC encourages applicants to have a pre-filing meeting with the OCC.

(B) A national bank must file an application and obtain prior approval before acquiring or establishing an operating subsidiary, or performing a new activity in an existing operating subsidiary, if the bank controls the subsidiary but owns 50 percent or less of the voting (or similar type of controlling) interest of the subsidiary. These applications are not subject to the filing exemption in paragraph (e)(5)(vi) of this section and are not eligible for the notice procedures in

paragraph (e)(5)(iv) of this section.

* * *

(iii) OCC review and approval. The OCC reviews a national bank's application to determine whether the proposed activities are legally permissible and to ensure that the proposal is consistent with safe and sound banking practices and OCC policy and does not endanger the safety or soundness of the parent national bank. As part of this process, the OCC may request additional information and analysis from the applicant.

(iv) Notice process for certain activities. A national bank that is "well capitalized" and "well managed" may acquire or establish an operating subsidiary, or perform a new activity in an existing operating subsidiary, by providing the appropriate district office written notice within 10 days after acquiring or establishing the subsidiary, or commencing the activity, if the activity is listed in paragraph (e)(5)(v) of this section. The written notice must include a complete description of the bank's investment in the subsidiary and of the activity conducted and a representation and undertaking that the activity will be conducted in accordance with OCC policies contained in guidance issued by the OCC regarding the activity. To the extent the notice relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity that the company is engaged in and has present plans to conduct. The bank must also list for each state the lines of business for which the company holds, or will hold, an insurance license, indicating the state where the company holds a resident license or charter, as applicable. Any bank receiving approval under this paragraph is deemed to

have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

(v) Activities eligible for notice. The following activities qualify for the notice procedures, provided the activity is conducted pursuant to the same terms and conditions as would be applicable if the activity were conducted directly by a national bank:

(A) Holding and managing assets acquired by the parent bank, including investment assets and property acquired by the bank through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted;

(B) Providing services to or for the bank or its affiliates, including accounting, auditing, appraising, advertising and public relations, and financial advice and consulting;

(C) Making loans or other extensions of credit, and selling money orders, savings bonds, and travelers checks;

(D) Purchasing, selling, servicing, or warehousing loans or other extensions of credit, or interests therein;

(E) Providing courier services between financial institutions;

(F) Providing management consulting, operational advice, and services for other financial institutions;

(G) Providing check guaranty, verification and payment services;

(H) Providing data processing, data warehousing and data transmission products, services, and related activities and facilities, including associated equipment and technology, for the bank or its affiliates;

(I) Acting as investment adviser (including an adviser with investment discretion) or financial adviser or counselor to governmental entities or instrumentalities, businesses, or individuals, including advising registered investment companies and mortgage or real estate investment trusts, furnishing economic forecasts or other economic information, providing investment advice related to futures and options on futures. and providing consumer financial counseling;

(J) Providing tax planning and preparation services;

(K) Providing financial and transactional advice and assistance, including advice and assistance for customers in structuring, arranging, and executing mergers and acquisitions, divestitures, joint ventures, leveraged buyouts, swaps, foreign exchange, derivative transactions, coin and bullion, and capital restructurings;

(L) Underwriting and reinsuring credit related insurance to the extent permitted under section 302 of the GLBA (15 U.S.C. 6712);

(M) Leasing of personal property and acting as an agent or adviser in leases for others;

(N) Providing securities brokerage or acting as a futures commission merchant, and providing related credit and other related services;

(O) Underwriting and dealing, including making a market, in bank permissible securities and purchasing and selling as principal, asset backed obligations;

(P) Acting as an insurance agent or broker, including title insurance to the extent permitted under section 303 of the GLBA (15 U.S.C. 6713);

(Q) Reinsuring mortgage insurance on loans originated, purchased, or serviced by the bank, its subsidiaries, or its affiliates, provided that if the subsidiary enters into a quota share agreement, the subsidiary assumes less than 50 percent of the aggregate insured risk covered by the quota share agreement. A "quota share agreement" is an agreement under which the reinsurer is liable to the primary insurance underwriter for an agreed upon percentage of every claim arising out of the covered book of business ceded by the primary insurance underwriter to the reinsurer;

(R) Acting as a finder pursuant to 12 CFR 7.1002 to the extent permitted by published OCC precedent; [Footnote omitted]

(S) Offering correspondent services to the extent permitted by published OCC precedent;

(T) Acting as agent or broker in the sale of fixed or variable annuities;

(U) Offering debt cancellation or debt suspension

agreements;

(V) Providing real estate settlement, closing, escrow, and related services; and real estate appraisal services for the subsidiary, parent bank, or other financial institutions;

(W) Acting as a transfer or fiscal agent;

(X) Acting as a digital certification authority to the extent permitted by published OCC precedent, subject to the terms and conditions contained in that precedent; and

(Y) Providing or selling public transportation tickets, event and attraction tickets, gift certificates, prepaid phone cards, promotional and advertising material, postage stamps, and Electronic Benefits Transfer (EBT) script, and similar media, to the extent permitted by published OCC precedent, subject to the terms and conditions contained in that precedent.

(vi) No application or notice required. A national bank may acquire or establish an operating subsidiary without filing an application or providing notice to the OCC, if the bank is adequately capitalized or well capitalized and the:

(A) Activities of the new subsidiary are limited to those activities previously reported by the bank in connection with the establishment or acquisition of a prior operating subsidiary;

(B) Activities in which the new subsidiary will engage continue to be legally permissible for the subsidiary; and

(C) Activities of the new subsidiary will be conducted in accordance with any conditions imposed by the OCC in approving the conduct of these activities for any prior operating subsidiary of the bank.

(vii) Fiduciary powers. If an operating subsidiary proposes to exercise investment discretion on behalf of customers or provide investment advice for a fee, the national bank must have prior OCC approval to exercise fiduciary powers pursuant to § 5.26.

(6) Annual Report on Operating Subsidiaries –

(i) Filing requirement. Each national bank shall prepare and file with the OCC an Annual Report on Operating Subsidiaries containing the information set forth in paragraph (e)(6)(ii) of this section for each of its operating subsidiaries that:

(A) Is not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5)); and

(B) Does business directly with consumers in the United States. For purposes of paragraph (e)(6) of this section, an operating subsidiary, or any subsidiary thereof, does business directly with consumers if, in the ordinary course of its business, it provides products or services to individuals to be used primarily for personal, family, or household purposes.

(ii) Information required. The Annual Report on Operating Subsidiaries must contain the following information for each covered operating subsidiary listed:

(A) The name and charter number of the parent national bank;

(B) The name (include any "dba" (doing business as), abbreviated names, or trade names used to identify the operating subsidiary when it does business directly with consumers), mailing address (include the street address or post office box, city, state, and zip code), e-mail address (if any), and telephone number of the operating subsidiary;

(C) The principal place of business of the operating subsidiary, if different from the address provided pursuant to paragraph (e)(6)(ii)(B) of this section; and

(D) The lines of business in which the operating subsidiary is doing business directly with consumers by designating the appropriate code contained in appendix B (NAICS Activity Codes for Commonly Reported Activities) to the Instructions for Preparation of Report of Changes in Organizational Structure, Form FR Y-10, a copy of which is set forth on the OCC's Web site at http://www.occ.gov. If the operating subsidiary is engaged in an activity not set forth in this list, a national bank shall report the code 0000 and provide a brief description of the activity.

(iii) Filing time frames and availability of information. Each national bank's Annual Report on Operating Subsidiaries shall contain information current as of December 31st for the year prior to the year the report is filed. The national bank shall submit its first Annual Report on Operating Subsidiaries (for information as of December 31, 2004) to the OCC on or before January 31, 2005, and on or before January 31st each year thereafter. The national bank may

submit the Annual Report on Operating Subsidiaries electronically or in another format prescribed by the OCC. The OCC will make available to the public the information contained in the Annual Report on Operating Subsidiaries on its Web site at http://www.occ.gov.

§ 7.4000 Visitorial powers.

(a) General rule.

(1) Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law. However, production of a bank's records (other than non-public OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.

(2) For purposes of this section, visitorial powers include:

(i) Examination of a bank;

(ii) Inspection of a bank's books and records;

(iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and

(iv) Enforcing compliance with any applicable federal or state laws concerning those activities.

(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.

(b) Exceptions to the general rule. Under 12 U.S.C. 484, the OCC's exclusive visitorial powers are subject to the following exceptions:

(1) Exceptions authorized by Federal law. National banks are subject to such visitorial powers as are provided by Federal law. Examples of laws vesting visitorial power in other governmental entities include laws authorizing state or other Federal officials to:

(i) Inspect the list of shareholders, provided that the official is authorized to assess taxes under state authority (12 U.S.C. 62; this section also authorizes inspection of the shareholder list by shareholders and creditors of a national bank);

(ii) Review, at reasonable times and upon reasonable notice to a bank, the bank's records solely to ensure compliance with applicable state unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with those laws (12 U.S.C. 484(b));

(iii) Verify payroll records for unemployment compensation purposes (26 U.S.C. 3305(c));

(iv) Ascertain the correctness of Federal tax returns (26 U.S.C. 7602);

(v) Enforce the Fair Labor Standards Act (29 U.S.C. 211); and

(vi) Functionally regulate certain activities, as provided under the Gramm-Leach-Bliley Act, Pub.L. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

(2) Exception for courts of justice. National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.

(3) Exception for Congress. National banks are subject to such visitorial powers as shall be, or have been, exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

(c) Report of examination. The report of examination made by an OCC examiner is designated solely for use in the supervision of the bank. The bank's copy of the report is the property of the OCC and is loaned to the bank and any holding company thereof solely for its confidential use. The bank's directors, in keeping with their responsibilities both to depositors and to shareholders, should thoroughly review the report. The report may be made available to other persons only in accordance with the rules on disclosure in 12 CFR part 4.

§ 7.4006 Applicability of State law to national bank operating subsidiaries.

Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.

§ 34.1 Purpose and scope.

(a) Purpose. The purpose of this part is to set forth standards for real estate-related lending and associated activities by national banks.

(b) Scope. This part applies to national banks and their operating subsidiaries as provided in 12 CFR 5.34.

* * *

§ 34.4 Applicability of state law.

(a) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks. Specifically, a national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning:

(1) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(3) Loan-to-value ratios;

(4) The terms of credit, including schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified

event external to the loan;

(5) The aggregate amount of funds that may be loaned upon the security of real estate;

(6) Escrow accounts, impound accounts, and similar accounts;

(7) Security property, including leaseholds;

(8) Access to, and use of, credit reports;

(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;

(11) Disbursements and repayments;

(12) Rates of interest on loans;[29]

(13) Due-on-sale clauses except to the extent provided in 12 U.S.C. 1701j-3 and 12 CFR part 591; and

(14) Covenants and restrictions that must be

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[29] The limitations on charges that comprise rates of interest on loans by national banks are determined under Federal law. *See* 12 U.S.C. 85 and 1735f-7a; 12 CFR 7.4001. State laws purporting to regulate national bank fees and charges that do not constitute interest are addressed in 12 CFR 7.4002.

contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

(b) State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' real estate lending powers:

(1) Contracts;

(2) Torts;

(3) Criminal law;[30]

(4) Homestead laws specified in 12 U.S.C. 1462a(f);

(5) Rights to collect debts;

(6) Acquisition and transfer of real property;

(7) Taxation;

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[30] *But see* the distinction drawn by the Supreme Court in *Easton* v. *Iowa*, 188 U.S. 220, 238 (1903) between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States." The Court stated that "[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction ** *. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States." *Id.* at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

(8) Zoning; and

(9) Any other law the effect of which the OCC determines to be incidental to the real estate lending operations of national banks or otherwise consistent with the powers and purposes set out in § 34.3(a).

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No. 05-1342

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SUPREME COURT, U.S.

In the Supreme Court of the United States

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Financial and Insurance Services,

Petitioner,

v.

WACHOVIA BANK, N.A. and WACHOVIA MORTGAGE CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

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Constitutional Provisions

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 16
U.S. Const. Amend. X 2, 6, 16, 17, 18

For six years, Wachovia Mortgage complied in full with the Michigan laws that it now claims are preempted as a result of a corporate reshuffling in 2003 that resulted in Wachovia Bank, N.A.—long a sister company—becoming its parent corporation. Thus, for six years, Wachovia Mortgage registered in Michigan to engage in the business of making mortgage loans, paid an annual fee to renew that registration, submitted financial statements and annual reports to the Commissioner of the Michigan Office of Financial and Insurance Services (OFIS), retained documents related to those statements and reports for possible examination by the Commissioner, and was subject to investigation by OFIS for consumer complaints that federal regulators were not adequately pursuing. *See* Pet. Br. 7-8; JA 19a. Tellingly, despite this significant experience with State regulation, Wachovia Mortgage has nothing specific to say about the interference it alleges would result from the requirement that it comply with such registration and reporting requirements in multiple States.

Even aside from this failure to substantiate its claim that complying with those State-law requirements "prevent[s] or significantly interfere[s] with" either Wachovia Bank's or Wachovia Mortgage's exercise of a power granted to national banks, *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996), Respondents ignore that Congress spoke directly to the issue of the Office of the Comptroller of the Currency's (OCC) authority to regulate national bank affiliates, such as operating subsidiaries. In 12 U.S.C. § 481, Congress gave the OCC visitorial authority over national bank affiliates—and there is no dispute that an operating subsidiary is one kind of affiliate—that is limited and derivative of the more extensive visitorial powers Congress gave the OCC with respect to national banks. In 12 U.S.C. § 484, Congress made the OCC's visitorial powers exclusive as to national banks only. This clear statutory language—which must be interpreted in light of background corporate-law principles and the presumption against preemption—precludes the claims of Respondents and their *amici* that Congress granted the OCC full and exclusive

visitorial powers over one class of State-chartered affiliates of federally chartered national banks. Nor is there any merit to their claims that the implied definition of operating subsidiaries in the Gramm-Leach-Bliley Act (GLBA) altered Congress's long-standing allocation of visitorial powers in § 481.

Because Congress unambiguously has not given the OCC either full or exclusive visitorial powers over any national bank affiliates, the Court should find that the OCC's regulations asserting both full and exclusive visitorial powers over operating subsidiaries are unlawful. The Court need not reach the question of the deference due to the OCC's regulations. But, even if there were any ambiguity in the statute, no deference is due those regulations. First, Congress did not grant the OCC the authority to adopt preemptive regulations of the type challenged here. Second, the OCC itself did not, in promulgating the regulations at issue here, make a policy decision in favor of preemption; instead, it made a guess about what courts would likely do. Third, agency rules purporting to preempt State laws are not entitled to deference.

Finally, the Tenth Amendment prevents the OCC from preempting the State laws at issue here. The practical effect of the OCC's regulations is to transform State-chartered companies into "creatures of the federal government" without the State's consent. *Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 335 (1935). This transformation is especially offensive under the Tenth Amendment, because the OCC claims that its regulations preclude the States, including the State Attorneys General and State Banking Commissioners, from vindicating important policy objectives associated with the States' historic police powers, including the protection of citizens from predatory and abusive mortgage-lending practices.

I. In the National Bank Act, Congress withheld from the OCC both full and exclusive visitorial powers over national bank affiliates.

A. Sections 481 and 484 preclude the OCC regulations purporting to preempt State authority over operating subsidiaries.

There is no dispute that an operating subsidiary is an "affiliate" within the meaning of 12 U.S.C. § 221a(b) and is not itself a "national bank." *See* Resp. Br. 29; U.S. Br. 18; Pet. Br. 13-14; NCSL Br. 22-23; NAR Br. 6-8. In § 481, Congress expressly addressed the OCC's authority to examine both national banks and their affiliates. As to national banks, Congress gave the OCC the power to "examine every national bank as often as the [OCC] shall deem necessary" and the "power to make a thorough examination of all the affairs of the bank." 12 U.S.C. § 481. In stark contrast to its expansive authority to examine national banks, the OCC has only limited authority to examine the affiliates of a national bank. Congress provided that, "in making the examination of any national bank," the OCC may "examin[e] . . . the affairs of all its affiliates," but only "as shall be necessary to disclose fully the relations between [the] bank and [its] affiliates and the effect of such relations upon the affairs of [the] bank." *Id.* In other words, the OCC has no authority to investigate affiliates in their own right, but may do so only as an aid in making its "full and detailed report of the condition of [the national] bank." *Id.*

Congress went on to provide that, with respect to national banks, the visitorial powers assigned to the OCC are exclusive: "No national bank shall be subject to any visitorial powers except as authorized by Federal law." *Id.* § 484(a).[1] But that

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[1] Section 371(a), on which Respondents and the United States rely, similarly applies only to "national banking association[s]," 12 U.S.C. § 371(a), a term that is defined to be "synonymous and interchangeable" with the term "national bank," *id.* § 221. That section, therefore, also does not grant the OCC any authority, let alone exclusive authority, over national banks' affiliates. *See* Pet. Br. 15-16; NCSL Br. 21-22.

section does not make exclusive even the OCC's limited authority to "visit" national bank affiliates– it contains no mention of affiliates. Those provisions of the National Bank Act (NBA) must be interpreted consistent with the "basic tenet of American corporate law" that a "corporate parent" and its "subsidiaries" are "distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-75 (2003). Thus, if Congress had meant for the exclusive authority it granted to the OCC to apply to both national banks and some of their affiliates (such as operating subsidiaries), it would have said so expressly; but Congress instead made clear that the limited and non-exclusive authority conferred in § 481 applies to "*all* [of a national bank's] affiliates." 12 U.S.C. § 481 (emphasis added).[2] Moreover, where Congress has intended to draw distinctions between and among national bank affiliates, it has done so expressly and for limited purposes. *See, e.g., id.* §§ 371c(b)(1)-(2)(A) (exempting certain national bank affiliates from restrictions on inter-company transactions), 371c-1(d)(1) (same).

Respondents and their *amici* have little to say in response to the clear language of § 481. Respondents' primary contention is that, because §§ 481 and 484, as well as the definition of affiliate in § 221a(b), were enacted before the OCC authorized operating subsidiaries, those Congresses cannot have had any intention with respect to that class of affiliates. Resp. Br. 29; U.S. Br. 18. But that ignores that Congress purposefully chose extremely broad language in those sections—referring to "all" affiliates in § 481 and defining "affiliate" in § 221a(b) as "any" entity that a national bank, "directly or indirectly, owns or controls." As this Court has said before, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates

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[2] *See Dole Food*, 538 U.S. at 476 (requiring Congress to "indicat[e] that [it] intended . . . to depart from the general rules regarding corporate formalities"); *United States v. Bestfoods*, 524 U.S. 51, 62 (1998) (holding that, "against this venerable common-law backdrop, . . . congressional silence is audible").

breadth." *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (internal quotation marks omitted). In addition, after the OCC authorized the use of operating subsidiaries, Congress enacted provisions, such as §§ 371c and 371c-1, that distinguish between and among types of affiliates expressly. Yet, despite the fact that Congress has amended §§ 481 and 484 on numerous occasions since 1980, Congress has not seen fit to add language to those sections that would extend the OCC's full and exclusive visitorial powers over national banks to their operating subsidiaries. For these reasons, Congress's chosen language in §§ 481 and 484 can no more be read to grant the OCC full and exclusive visitorial powers over operating subsidiaries than the Bank Holding Company Act could be read to include "nonbank banks." *See Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361 (1986); Pet. Br. 14-15.

Respondents and the United States do not dispute this, but assert that the OCC "has not redefined the term 'national bank' in Section 484" and instead is interpreting the scope of "a national bank's incidental powers under Section 24 Seventh." Resp. Br. 31; *see* U.S. Br. 17. But, as the Ninth Circuit correctly found, the OCC itself had "conclu[ded] that § 484(a) . . . foreclose[d] the exercise of [visitorial powers over operating subsidiaries] by the states." *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 964 (9th Cir. 2005); *see* 69 Fed. Reg. 1895, 1900 (2004). In addition, § 24 (Seventh) describes the powers of national banks, not the OCC, and cannot be used to confer on the OCC full and exclusive visitorial powers beyond those set forth expressly in §§ 481 and 484(a). *See* Pet. Br. 21-22; NAR Br. 17-19; NCSL Br. 23-24.

B. Applicable interpretive principles all support Petitioner's interpretation of §§ 481 and 484.

At least three well-established rules of statutory interpretation—the presumption against preemption, the clear-statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and the canon of constitutional avoidance—all lead to the same

result as the plain language of §§ 481 and 484(a): Congress withheld from the OCC both full and exclusive visitorial powers over all national bank affiliates. The first two principles require a clear statement from Congress before the Court will find that a statute supersedes "the historic police powers of the States," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)—including the registration and monitoring of foreign corporations operating within their borders and the protection of their consumers from the actions of such corporations—or "upset[s] the usual constitutional balance of federal and state powers," *Gregory*, 501 U.S. at 460. It is undisputed that the National Bank Act contains no clear statement granting to the OCC the authority it has claimed in its regulations. The third principle counsels in favor of the construction of a statute that avoids "grave and doubtful constitutional questions," *United States ex rel. Attorney Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909), such as those presented by Respondents' and the OCC's interpretation, which violates the Tenth Amendment. *See* Pet. Br. 22-28.

Respondents and the United States claim that the presumption against preemption does not apply because of a history of "'significant federal presence'" in the regulation of national banks. Resp. Br. 23 (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)); *accord* U.S. Br. 22. But such claims ignore that "in 1870 and thereafter this Court held that federally chartered banks are subject to state law" and "found numerous state laws applicable to federally chartered banks." *Atherton v. FDIC*, 519 U.S. 213, 222-23 (1997). This extensive history of State regulation of national banks is set out at length in *Atherton*, *id.* at 219-26, but ignored entirely by Respondents and the United States.[3] Congress, moreover, ratified the States'

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[3] *See also National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1870) (declaring that national banks "are subject to the laws of the State"). In *Commonwealth*, moreover, the Court rejected the claim—echoed by Respondents (Br. 23)—that *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), immunized national banks from State legislation. *See* 76 U.S. (9 Wall.) at 361-62; *see also Osborn v. Bank of United States*, 22 U.S.

authority in 1994, when it enacted the Riegle-Neal Act. *See* Pet. Br. 2-3; NCSL Br. 11-12. State regulation of operating subsidiaries, therefore, is fundamentally different from the types of State vessel equipment and operating standards at issue in *Locke*, where the Court found that "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme," and there is no history that supports an "assumption that concurrent regulation by the State is a valid exercise of its police powers." 529 U.S. at 108. Instead, the applicable rule is stated by *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 86 (1987), where the Court held that the "longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws . . . , it would have said so explicitly."

Equally misplaced are claims that *Barnett Bank* rejects the applicability of the presumption against preemption in the interpretation of the National Bank Act. *See* Resp. Br. 23; U.S. Br. 23. Indeed, *Barnett Bank* contains no mention of the presumption against preemption. The question in *Barnett Bank*, moreover, was "whether a federal statute that permits national banks to sell insurance in small towns pre-empts a state statute that forbids them to do so." 517 U.S. at 27. In answering that question—which is not the question presented here[4]—the Court

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(9 Wheat.) 738, 859-60 (1824) (Marshall, C.J.) (explaining that *McCulloch* was based on the fact that the Second Bank of the United States was "a public corporation" and that, if it had been a "mere private corporation" (which Wachovia Bank is), it "would certainly be subject to the taxing power of the State").

[4] Nothing in the challenged Michigan laws forbids a national bank from owning or conducting business through an operating subsidiary. For the same reason, Respondents and the United States err in relying on this Court's statement in *Barnett Bank* that, "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies." 517 U.S. at 34; *see* Resp. Br. 21-22; U.S. Br. 27. Petitioner does not claim—as the State of Florida did in *Barnett Bank*—that the State of Michigan can exercise a State-law prohibition on a national bank undertaking activities through an operating subsidiary.

explained that it "must ask whether or not the Federal and State Statutes are in 'irreconcilable conflict' " or whether, as the State claimed, the federal statute merely grants "permission to sell insurance to the extent that state law also grants permission to do so." *Id.* at 31 (emphasis omitted). In the context of rejecting the State's claim about the meaning of that federal statute, this Court noted that "grants of both enumerated and incidental 'powers' to national banks" are "not normally limited by, but rather ordinarily pre-empt[], contrary state law." *Id.* at 32. Restating that same point later in the opinion, the Court explained that "the pre-emptive scope of statutes . . . granting a power to national banks" is such that a State cannot "forbid, or . . . impair significantly, the exercise of a power that Congress explicitly granted." *Id.* at 33.

Barnett Bank, therefore, does not hold that the presumption against preemption does not apply in a case, such as this one, where there is no irreconcilable conflict between federal and State law. Instead, *Barnett Bank* does nothing more than restate basic principles of conflict preemption, making clear that the National Bank Act preempts State law that is contrary to—that is, irreconcilably conflicts with—federal law because it forbids or significantly impairs the exercise of a power Congress granted. This Court stressed that point by expressly stating that the National Bank Act does "not . . . deprive States of the power to regulate national banks, where (*unlike here*) doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Id.* (emphasis added). In this case, the evidence of Wachovia Mortgage's six years of compliance with the Michigan laws at issue—and its inability to identify any specific, significant impairment or irreconcilable conflict—demonstrates that these laws can readily coexist with federal law.[5]

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[5] Respondents and their *amici* largely dispute the applicability of the *Gregory* clear-statement rule and the canon of constitutional avoidance solely on the basis of their claims regarding the Tenth Amendment. *See* Resp. Br. 49-50;

C. The implicit definition of operating subsidiaries in the Gramm-Leach-Bliley Act did not expand the OCC's authority over operating subsidiaries or preempt the State laws at issue here.

Respondents argue at length that Congress's 1999 enactment of the GLBA, which added a definition of "financial subsidiary" to the National Bank Act, had the effect of extending the OCC's exclusive visitorial powers over national banks, as set forth in §§ 481 and 484(a), to cover operating subsidiaries. *See* Resp. Br. 18-20, 25, 30-31, 39, 40.[6] Such an interpretation contravenes the many clear-statement and similar interpretive rules applicable here, including those set forth in *Dole Food*, *Gregory*, and *Rice*. Their claim also conflicts with the basic principle that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). It strains credulity to suggest that Congress, in adding a definition that only inferentially acknowledges the existence of operating subsidiaries, radically altered the OCC's and the States' respective authority, in place for more than 130 years, over national bank affiliates.

In any event, the text of that definition cannot bear the weight Respondents place on it. In the GLBA, Congress provided that, for purposes of the new § 24a, the term "financial subsidiary" excludes affiliates that "engage[] solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C.

U.S. Br. 30; ABA Br. 27-28. As shown below, those claims are without merit. *See infra* Part III.

[6] The United States does not follow Respondents in placing such weight on that definition, claiming only that it "fortifie[s]" the (erroneous) "conclusion that the Act preempts [the] state[]" laws at issue here. U.S. Br. 28.

§ 24a(g)(3)(A).[7] Thus, the excluded affiliates are those that solely conduct activities that a national bank can "engage in directly" and that "conduct[]" those activities pursuant to the same rules that "govern the *conduct* of . . . national banks." *Id.* (emphasis added). These affiliates, therefore, are defined by what they do, not who regulates them.

The OCC's contemporaneous response to this new definition, moreover, conflicts with Respondents' current claims. At the time Congress enacted the GLBA, OCC regulations promulgated in 1996 permitted a national bank's operating subsidiaries to engage in activities that the national bank could not lawfully conduct itself. *See* 12 C.F.R. § 5.34(f) (1999). Immediately following the enactment of the GLBA, the OCC amended its regulations to rescind its 1996 rule and narrow its definition of operating subsidiary. In doing so, the OCC did not suggest that the GLBA had extended its authority over national banks to reach operating subsidiaries. Instead, it simply noted that, contrary to its 1996 rule, "the GLBA makes clear that an operating subsidiary may engage only in activities that are permissible for the parent bank to engage in directly."[8] In rescinding the 1996 regulation, moreover, the OCC was following Congress's intent, as set forth in the conference

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[7] Section 24a imposes a host of substantive duties on financial subsidiaries and the national banks that own them, including requirements pertaining to capital levels, managerial ratings, and community reinvestment standards. *See* 12 U.S.C. § 24a(a)-(f). Affiliates that meet the definition in § 24a(g)(3)(A) are exempted from those duties.

[8] *See* 65 Fed. Reg. 12,905, 12,909 (2000). The OCC, however, adopted a rule that deviates from Congress's definition, by asserting that an operating subsidiary "conducts activities . . . pursuant to the same *authorization*, terms and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. § 5.34(e)(3) (emphasis added). The OCC offered no explanation for its addition of the word "authorization," which does not appear in § 24a(g)(3)(A). The OCC's reference to the national bank's "authorization" from the OCC ignores an "irreducible difference between national banks and their operating subsidiaries": the former are "directly chartered by the federal government," while the latter "are incorporated under a state's law." *Boutris*, 419 F.3d at 965.

committee report, that it alter its regulations. *See* H.R. Conf. Rep. No. 106-434, at 160 (1999).

Finally, immediately prior to the enactment of the GLBA, the OCC rejected a request that it "clarify that its exclusive visitorial powers extend to operating subsidiaries of national banks." 64 Fed. Reg. 60,092, 60,095 (1999). In other words, the OCC was asked in 1999 to make the same determination of its authority that is at issue here. The OCC noted that its regulations at the time provided that "each operating subsidiary is subject to examination and supervision by the OCC." *Id.* (citing 12 C.F.R. § 5.34(d)(3) (1999)).[9] The OCC then rejected the requested clarification, explaining that its regulation "does not mean . . . that [its] jurisdiction necessarily is exclusive over a given subsidiary" and listing, as an example of other regulators that might have authority over a given subsidiary, "a *state* insurance department." *Id.* (emphasis added). Because Congress is presumed to be cognizant of relevant administrative rulings when it adopts legislation, *see, e.g., Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 782-83 (1985), its subsequent enactment of § 24a(g)(3)(A)—if it has any substantive import at all—can only be read as ratifying the OCC's view that it does *not* have exclusive visitorial powers over operating subsidiaries.

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For all these reasons, the National Bank Act unambiguously does not preempt the Michigan laws at issue here. For the same reasons, the OCC's regulations—including 12 C.F.R. §§ 7.4006, 34.1(b), and 34.4(a)(1)—that purport to preempt those Michigan laws exceed the limited and non-exclusive visitorial powers over national bank affiliates that Congress granted to the OCC. The court below erred in finding otherwise, and its decision should be reversed.

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[9] The regulation did not state either that the OCC's authority over operating subsidiaries was exclusive or that it was greater than its authority over all affiliates, as set forth in § 481.

II. Even if the National Bank Act were ambiguous, the OCC's assertion of authority to preempt State regulation of operating subsidiaries is not entitled to deference and should be rejected as unpersuasive.

As this Court has recently reaffirmed, "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved." *Gonzales v. Oregon*, 126 S. Ct. 904, 916 (2006). Instead, a further precondition to the application of such deference is that Congress delegated authority to that administrative official or agency. *See id.*; *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Congress uses a standard formulation when it intends to "give[] an agency broad power to enforce all provisions of [a] statute," *Gonzales*, 126 S. Ct. at 916—it gives the agency the authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of" a statute or set of statutory provisions.[10] While Congress used that language in granting the OCC rulemaking authority with respect to specific statutory provisions, *see* 12 U.S.C. §§ 92a(j), 211(a), the delegation of authority on which the OCC relied here—12 U.S.C. § 93a—does not employ that formulation. Instead, in that section, Congress gave the OCC only "authori[ty] to prescribe rules and regulations to carry out the responsibilities of the office." *Id.*

This delegation is tied to the OCC's "responsibilities" in the same way that the delegation to the Attorney General in 21 U.S.C. § 871(b) is tied to his statutory "functions." In *Gonzales*, the Court found that such a delegation allows the administrative official "to best determine how to execute" those

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[10] *E.g.*, 47 U.S.C. § 201(b), *cited in Gonzales*, 126 S. Ct. at 916; *see* 15 U.S.C. § 1604(a) (similar); *see also, e.g.*, 7 U.S.C. § 12a(5) (authorizing promulgation of regulations "to effectuate any of the provisions or to accomplish any of the purposes of this chapter"); *id.* § 87e(a) (authorizing promulgation of rules that "the Secretary deems necessary to effectuate the purposes or provisions of this chapter"); 15 U.S.C. § 717*o* (authorizing promulgation of regulations found "necessary or appropriate to carry out the provisions of this chapter").

functions or responsibilities, but does not include the authority to "define the substantive standards" under the statute. 126 S. Ct. at 919. As the Court went on to explain, when Congress chooses to delegate broad rulemaking authority to an agency, "it does so not by referring back to the administrator's functions but by giving authority over the provisions of the statute he is to interpret." *Id.* at 920.[11] The contentions of Respondents and the United States that § 93a is "unusually broad" and "encompasses any statute administered by the Comptroller," Resp. Br. 37-38; U.S. Br. 15 n.4, cannot be squared with the Court's holding in *Gonzales*. Therefore, the OCC's claim to deference stumbles at the first hurdle—and this is true regardless of whether the deference at issue is called *Chevron*,[12] *de la Cuesta*,[13] or *Shimer*,[14] as all of those doctrines require that Congress has delegated sufficient authority to the agency. *See* Pet. Br. 33-34; States Br. 7-10; Center Br. 4; NCSL Br. 15-18.[15]

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[11] Contrary to the claims of Respondents and the United States, 12 U.S.C. § 43 confirms—and does not call into question—the limited authority Congress conferred in § 93a. *See* Resp. Br. 12, 22 n.11, 36; U.S. Br. 15. In § 43, Congress imposed special procedures that the OCC must follow "[b]efore issuing any opinion letter or interpretive rule" that sets forth the agency's view that federal law preempts State law. 12 U.S.C. § 43(a). Notably absent from § 43 is any reference to *legislative* rules, confirming that Congress has not delegated broad, substantive rulemaking authority on the OCC, but instead has expressly limited that agency's inherent authority to express its views through non-binding statements. *See* Center for State Enforcement of Antitrust and Consumer Protection Laws (Center) Br. 18-19.

The Administrative Procedure Act, in contrast, exempts such non-binding statements of agency views from such procedures, *see* 5 U.S.C. § 553(b), and those statements lack the force of law. *See Mead*, 533 U.S. at 234.

[12] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[13] *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982).

[14] *United States v. Shimer*, 367 U.S. 374 (1961).

[15] The *amici* Law Professors elide this issue and pretend that § 93a uses Congress's standard language for delegating rulemaking authority. *See* Law Prof. Br. 27-28 (asserting that § 93a "empowers the OCC to issue 'rules and regulations' enforcing the NBA"). Nor is there any merit to their implication that the Court has already determined that § 93a is the type of delegation that

In addition, even assuming that Congress granted the OCC sufficient authority to adopt preemptive regulations, there is no indication that the OCC, in promulgating the regulations at issue here, made a policy determination that preemption is warranted. In adopting 12 C.F.R. § 7.4006, which asserts that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank," the OCC expressly asserted that this section "does *not* effect preemption of any State law" and instead reflects the OCC's best guess about the decision "a Federal court would reach, *even in the absence* of the regulation." 66 Fed. Reg. 34,784, 34,790 (2001) (emphases added). Applying deference to such a rule would be pure bootstrapping, as it would turn the OCC's prediction of how courts *will* act into a determinant of how courts *must* act. Nor can the OCC's statement be explained away, as Respondents and the United States attempt to do, by pointing to the OCC's adoption of its current operating-subsidiary rule in 2000. *See* Resp. Br. 34 n.19; U.S. Br. 11 n.1. In promulgating that earlier regulation, the OCC said nothing at all about any preemptive intent, and instead made clear that it was simply rescinding the existing definition of operating subsidiaries that Congress rejected in the GLBA. *See* 65 Fed. Reg. at 12,908-09; *supra* Part I.C.

Finally, *Chevron* deference to the OCC regulations at issue is not warranted because agency preemption determinations are not entitled to such deference unless Congress specifically delegates the authority to make preemption determinations having the force of law. This is so because, among other reasons, administrative agencies are not institutionally suited to take into account the serious federalism implications of displacing State law, are prone to expand their own power by eliminating competing regulators, and have no special

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triggers *Chevron* deference. *See id.* at 28. Neither *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), nor *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995), so much as mentions § 93a.

competence in applying preemption doctrine. *See* Pet. Br. 31-37; Center Br. 8-15.

Respondents, the United States, and various supporting *amici* argue at length that this Court's precedents "conclusively establish" (U.S. Br. 15) or "demonstrate" (Law Prof. Br. 8) that agency preemption determinations are entitled to *Chevron* deference. In so arguing, they do precisely what this Court cautioned against in *Smiley*: "confus[ing] the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive." 517 U.S. at 744. The cases upon which Respondents and their *amici* rely deferred to agency determinations about substantive law, not agency assertions as to whether State law must be displaced.[16]

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[16] For example, in *Shimer*, the Court first concluded that Veterans' Administration (VA) regulations setting procedures for resolving certain indemnity actions against veterans conflicted with the different procedures prescribed by Pennsylvania law. Although the Court observed in this connection that the VA intended its regulations to supersede State law, 367 U.S. at 381, there is no suggestion in this part of the opinion that the Court was deferring in any way to the VA on the question of preemption. Only after independently finding a conflict between the two sets of procedures did the Court turn, in Part II of the opinion, to the question whether the VA had statutory authority to issue its regulation. Only on this question—what *Smiley* would later characterize as the question of substantive meaning—did the Court defer to the judgment of the VA, using language that anticipates the subsequent decision in *Chevron*. *See id.* at 383.

Likewise, in *de la Cuesta*, the Court independently concluded that the California rule prohibiting due-on-sale clauses conflicted with a Federal Home Loan Bank Board regulation permitting the adoption of such clauses. After finding a conflict, the Court turned, in Part IV of its opinion, to the question whether the Board had acted within the scope of its authority in promulgating the regulation, and found that the rule was permissible. As in *Shimer*, there is no suggestion that courts should defer to an agency on the question of preemption, as opposed to the meaning of federal law administered by the agency.

Finally, in *City of New York v. FCC*, 486 U.S. 57 (1988), the question was whether the Federal Communications Commission had authority to expressly preempt State and local regulations involving cable television signal quality. The Court concluded that Congress had delegated this extraordinary authority to the agency based primarily on recent legislation

It is precisely for this reason that the Court stated in *Smiley* that "[w]e may assume (without deciding) that the latter [preemption] question must always be decided *de novo* by the courts." *Id.* That statement would be incomprehensible if the Court's precedents already "conclusively establish[ed]" (U.S. Br. 15) that *Chevron* deference applies to agency determinations of preemption.

For all of these reasons, even if §§ 481 and 484, interpreted according to their plain terms and in light of applicable canons of statutory construction, do not resolve the question before the Court, the court below erred in deferring to the OCC's interpretation of those provisions. Because that interpretation is unpersuasive for the reasons set forth in Part I, the Court should reject the OCC's regulations and reverse the decision below.

III. The OCC's regulation violates the Tenth Amendment by effectively transforming State-chartered corporations into federal entities.

The Tenth Amendment precludes Congress from acting—even where the Commerce Clause grants Congress "legislative authority over the subject matter"—through statutes that "violate[] the principles of federalism contained in the Tenth Amendment." *Reno v. Condon*, 528 U.S. 141, 149 (2000). For this reason, Respondents and the United States wrongly assert that Congress's Commerce Clause authority over real estate lending confirms the constitutionality of the OCC's regulation purporting to preempt States from exercising visitorial powers over operating subsidiaries of national banks. *See* Resp. Br. 46-47; U.S. Br. 29-30. On the contrary, the fact that a federal law regulates "article[s] in interstate commerce does not

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that it construed as ratifying previous agency regulations preempting State regulation of cable television. *Id.* at 66-69. Notably, however, there was no suggestion that courts should defer to agency determinations of preemption where applicable statutes and regulations leave the question of preemption in doubt. Certainly, there was no suggestion that agencies are entitled to *Chevron* deference for their determinations that preemption is warranted. *Chevron* was not even cited.

conclusively resolve the constitutionality of the" law. *Reno*, 528 U.S. at 149. The Tenth Amendment inquiry goes further and requires consideration of whether federal law—here, the OCC's regulation—violates applicable principles of federalism.

In this case, the applicable principles are clearly enunciated by this Court's decision in *Hopkins Federal Savings & Loan Association v. Cleary*. Contrary to the claims of Respondents, *Hopkins* was not simply a case about whether federal law could "regulate corporate dissolution." Resp. Br. 48.[17] Instead, *Hopkins* involved Wisconsin's objection to a provision of the Home Owners' Loan Act of 1933 (HOLA) that permitted the "conversion [of] state associations into federal ones" irrespective of the "consent of the state or compliance with its laws." 296 U.S. at 332.[18] Wisconsin objected that, as a result of this conversion, it was stripped of its authority to subject building and loan organizations organized in that State to "supervision by the administrative agencies of the state . . . in the course of doing business." *Id.* at 328. This supervision included the requirement that organizations annually "submit to the commissioner a report of their condition," as well as the authority of the commissioner to "take charge of the business" of an organization if its "business has been conducted in a manner contrary to law." *Id.* at 329.

The Court found that this provision of HOLA was "an unconstitutional encroachment upon the reserved powers of the states" in violation of the Tenth Amendment because that provision stripped the States of authority over "matters of governmental policy," such as how those organizations "shall be

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[17] Equally misplaced is *amici* American Bankers Association's claim that *Hopkins* held, instead, only that "federal law cannot confer on [a State-chartered] institution powers that the state charter has expressly denied it." ABA Br. 29.

[18] The comparable provision of the National Bank Act at that time—as it does today—permitted a State bank to convert into a national bank, provided that the conversion is "'not . . . in contravention of the State law.'" *Hopkins*, 296 U.S. at 333-34 (quoting 12 U.S.C. § 35).

. . . maintained and supervised." *Id.* at 335, 337. The Court did not dispute Congress's authority to create federal building and loan associations, but held that the "critical question" was whether that power carried with it the power to take "corporations created by the states and turn them into different corporations created by the nation." *Id.* at 336. The Court held that Congress lacked that additional power and, therefore, that this provision of HOLA was "an illegitimate encroachment . . . upon a domain of activity set apart by the Constitution as the province of the states." *Id.* at 338.

The OCC regulation challenged here effectuates the same kind of conversion as the statute struck down in *Hopkins*. Indeed, the OCC itself has concluded that State-chartered operating subsidiaries are the "equivalent" of—or, "in essence," the same as—internal divisions or departments of a federally chartered national bank. 66 Fed. Reg. at 34,788; 69 Fed. Reg. at 1900. The OCC's regulation thus transforms operating subsidiaries into national banks in all but name.[19] As in *Hopkins*, that transformation occurs over the objection of the chartering State; indeed, 49 States and the District of Columbia support Michigan's position here.[20] Finally, no different from *Hopkins*, that transformation is alleged to strip the State

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[19] *See* 12 U.S.C. § 22 (First) ("The name assumed by [a national bank] . . . shall include the word 'national.'").

[20] *See* States Br. 1. This uniformity among the States is a sufficient basis for rejecting suggestions that no Tenth Amendment concerns are raised here because Wachovia Mortgage is chartered in North Carolina, not Michigan. *See* Resp. Br. 47; U.S. Br. 30. Such claims, moreover, ignore that the OCC's regulations do not distinguish between native and foreign corporations that are operating subsidiaries, but instead purport to convert all of them into national bank equivalents. In any event, it is well-settled that each State is "legitimately concerned with safeguarding the interests of its own people in business dealings with corporations not of its own chartering but who do business within its borders" and is entitled to "assur[e] responsibility and fair dealing on the part of foreign corporations coming into a State." *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 208, 210 (1944). The OCC's regulation as applied to Wachovia Mortgage encroaches on that interest in the same manner as the HOLA provision struck down in *Hopkins*.

of authority to "supervis[e]" the entity "in the course of doing business" and to take action against that entity if its "business has been conducted in a manner contrary to law." *Hopkins*, 296 U.S. at 328-29. The OCC regulation, therefore, unconstitutionally encroaches "upon the reserved powers of the states" over "matters of governmental policy," such as how foreign corporations doing business in a State "shall be . . . supervised." *Id.* at 335, 337.

The violation of principles of federalism is particularly acute here, because the OCC's regulations purport to preempt not only the ministerial registration and reporting requirements applicable to companies such as Wachovia Mortgage, but also the right of OFIS to investigate consumer complaints and to enforce consumer-protection laws.[21] Among the laws that the court below held are preempted is MCL 445.1663(2). *See* Pet. App. 2a. That section provides that, when the Commissioner of OFIS receives a complaint against "a subsidiary of a federally chartered depository financial institution"—which includes an operating subsidiary such as Wachovia Mortgage—it must "immediately" send that complaint "to the appropriate federal regulatory authority." MCL 445.1663(2). The Commissioner of OFIS "shall make no investigation of the complaint" on her own "if the complaint is being adequately pursued by [that] federal regulatory authority," but may take action on the complaint if that is not the case. *Id.* This provision, therefore, is fully cooperative with any federal regulatory authority over such subsidiaries of federally chartered financial institutions, while at the same time recognizing that—as *amici* have shown

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[21] The OCC has adopted an unlawfully broad definition of "visitorial powers," through which it has asserted the "exclusive . . . authority" to "[e]nforc[e] compliance with *any* applicable federal or *state* laws concerning" the federal banking activities conducted by an operating subsidiary. 12 C.F.R. § 7.4000(a)(2)-(3) (emphases added). The issue of the lawfulness of that regulation, however, is not presented here, but is presented in a case pending before the Second Circuit. *See* Pet. Br. 24; NAR Br. 14 n.18; *Clearing House Ass'n, LLC, et al. v. Spitzer*, Nos. 05-5996 & 05-6001 (2d Cir., to be argued Dec. 4, 2006).

here—federal regulators, and the OCC in particular, are not equipped to be the sole enforcers of all complaints against such subsidiaries. *See* AARP Br. 12-13; NCSL Br. 17.

Indeed, State consumer-protection efforts have proved critical in combating predatory lending. In December 2002, State officials secured a nationwide settlement of approximately $484 million with Household International, in one of the largest (if not the largest) settlements of a consumer-protection investigation involving mortgage-lending practices.[22] The Household settlement resulted from consumer complaints and investigations by the States into allegations of misrepresentations and failure to provide timely and adequate disclosures and descriptions of loan terms. Ameriquest entered into a similar settlement this year with 49 States and the District of Columbia. That settlement generated approximately $295 million in relief for consumers nationwide.[23] If either Household or Ameriquest had structured their lending operations in operating subsidiaries of a national bank, the OCC regulations challenged here would have precluded the States from obtaining redress for their citizens for the abusive practices that gave rise to these settlements.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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[22] The Household settlement directly impacted approximately 19,000 Michigan consumers alone, who received approximately $15.7 million in relief. *See, e.g.*, News Release, *OFIS Announces Distribution of $15.7 Million in Settlement Payments to Michigan Household/Beneficial Borrowers* (Aug. 5, 2003), *available at* http://www.michigan.gov/documents/cis_hhf_annmt_71225_7.pdf.

[23] *See generally* http://www.ameriquestmultistatesettlement.com/.

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No. 05-1342

In the Supreme Court of the United States

LINDA A. WATTERS, COMMISSIONER, MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES, PETITIONER

v.

WACHOVIA BANK, N.A., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether regulations issued by the Comptroller of the Currency under the National Bank Act, 12 U.S.C. 1 *et seq.*, preempt the application of state banking laws to an operating subsidiary of a national bank.

2. Whether the Tenth Amendment prohibits the Federal Government from preempting the application of state banking laws to an operating subsidiary of a national bank.

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INTEREST OF THE UNITED STATES

The Comptroller of the Currency is the primary regulator of banks chartered under the National Bank Act, 12 U.S.C. 1 *et seq.* See *Nationsbank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257 (1995). The Comptroller accordingly has an interest in assuring that national banks are able to exercise, subject to his supervision, the powers granted to them by the National Bank Act. In that capacity, the Comptroller has promulgated regulations prescribing the circumstances in which state laws regulating the conduct of banking activities by national banks and their operating subsidiaries are preempted by federal law. The United States has participated in cases involving the preemptive scope of the National Bank Act, see *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25 (1995), and the Court invited the

views of the United States concerning the preemption question at issue here in *Wachovia Bank, N.A.* v. *Burke*, petition for cert. pending, No. 05-431 (filed Sept. 30, 2005). Because the questions presented by this case concern the validity of the Comptroller's preemptive regulations, the United States has an interest in the outcome of this case.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in an appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

1. The Office of the Comptroller of the Currency (OCC), a bureau within the Department of the Treasury, is responsible for administering the National Bank Act (the Act). 12 U.S.C. 1 *et seq.* The OCC's chief officer, the Comptroller of the Currency, is "charged by Congress with superintendence of national banks." *Nationsbank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995).

a. The National Bank Act provides that national banks "shall have power" to engage in certain enumerated functions, 12 U.S.C. 24, and also grants national banks "all such incidental powers as shall be necessary to carry on the business of banking," 12 U.S.C. 24 Seventh. The "Comptroller bears primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh," *Nationsbank*, 513 U.S. at 256, including the authority to define those "incidental powers" that are "necessary" for a national bank "to carry on the business of banking," 12 U.S.C. 24 Seventh; see *Nationsbank*, 513 U.S. at 258-260, 264. With respect to the "grants of both enumerated and incidental 'powers' to national banks" under 12 U.S.C. 24 Seventh, the "grants of authority [are] not normally limited by, but rather ordinarily pre-empt[], contrary state law." *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32 (1995); see *id.* at 34.

The Comptroller has long recognized as one "incidental power[]" of a national bank the authority to perform banking functions through an "operating subsidiary." See 12 C.F.R. 5.34. An operating subsidiary is a subsidiary in which a national bank has a controlling interest, and that engages solely in activities "that are permissible for a national bank to engage in directly." 12 C.F.R. 5.34(e). An operating subsidiary conducts its functions "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. 5.34(e)(3); see 12 U.S.C. 24a(g)(3)(A). Operating subsidiaries are treated as consolidated with the parent bank for purposes of many statutory and regulatory provisions, including certain accounting and reporting requirements. See 12 C.F.R. 5.34(e)(4). The Comptroller supervises and examines operating subsidiaries to ensure that their conduct of national bank functions is consistent with applicable law and with safe and sound practices. See 12 C.F.R. 5.34(e)(3). Before establishing an operating subsidiary, a national bank generally must obtain approval from the Comptroller through a licensing process set forth in the regulations. See 12 C.F.R. 5.34(b) and (e)(5).

The rule that an operating subsidiary performs its functions "pursuant to the same * * * terms and conditions that apply to the conduct of such activities by its parent national bank," 12 C.F.R. 5.34(e)(3); see 12 U.S.C. 24a(g)(3)(A), addresses the extent to which the "terms and conditions" of state law apply to an operating subsidiary, *i.e.*, the "same" extent as they may be applied to the parent bank. Another regulation makes that even more explicit, stating: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R. 7.4006.

b. The National Bank Act specifically authorizes national banks to engage in real estate lending activity. 12 U.S.C. 371

(national banks may "arrange, purchase or sell loans * * * secured by * * * real estate, subject to * * * such restrictions and requirements as the Comptroller * * * may prescribe"). The Comptroller, in exercising his rulemaking authority under that provision, has promulgated regulations "to set forth standards for real estate-related lending and associated activities by national banks." 12 C.F.R. 34.1(a). The regulations governing real estate lending activities explicitly apply both "to national banks and their operating subsidiaries." 12 C.F.R. 34.1(b). Those regulations provide that "a national bank may make real estate loans * * * without regard to state limitations concerning" a number of specifically enumerated subjects, including, of particular relevance, state laws concerning "[l]icensing" and "registration (except for purposes of service of process)." 12 C.F.R. 34.4(a)(1).

c. The National Bank Act preempts state law limitations on a national bank's exercise of "both enumerated and incidental 'powers,'" *Barnett Bank*, 517 U.S. at 32, and also generally prohibits state authorities from exercising "visitorial powers" over a national bank. 12 U.S.C. 484(a) ("No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress."). "Visitorial powers" encompass "[e]xamination of a [national] bank," "[i]nspection of a bank's books and records," "[r]egulation and supervision of activities authorized or permitted pursuant to federal banking law," and "[e]nforcing compliance with any applicable federal or state laws concerning those activities." 12 C.F.R. 7.4000(a)(2)(i)-(iv).

The Comptroller's regulations implementing Section 484(a) provide that, subject to specified exceptions, only the OCC or an OCC-authorized representative may exercise visitorial powers over national banks. 12 C.F.R. 7.4000(a). Accordingly, "[s]tate officials may not exercise visitorial powers with respect to national banks." *Ibid.* Because a national

bank's conduct of banking activities through an operating subsidiary is subject to the same terms and conditions of state law that would apply if the parent bank itself conducted the activity, 12 C.F.R. 5.34(e)(3), 7.4006, the limitations on state visitorial power over national banks established by Section 484(a) apply equally to the conduct of bank functions through an operating subsidiary. See 69 Fed. Reg. 1900-1901 (2004).

2. Respondent Wachovia Bank, N.A., is a national bank chartered by the OCC. Respondent Wachovia Mortgage Corporation, a North Carolina corporation, engages in the business of mortgage lending. Pet. 5; Pet. App. 4a.

From 1997 until 2003, Wachovia Mortgage was registered to conduct mortgage lending in Michigan. See Pet. 5. The pertinent Michigan laws require a mortgage lender, *inter alia*, to register with the State before conducting business there, to pay annual fees, to submit financial statements, and to retain documents for examination. See Pet. App. 2a n.1. Petitioner, the Commissioner of the Michigan Office of Insurance and Financial Services, administers Michigan's mortgage lending laws. Registered lenders are subject to petitioner's "general supervision and control," and she possesses authority to conduct examinations and investigations of registrants and to enforce applicable requirements against them. See Mich. Comp. Laws Ann. §§ 445.1661, 445.1665-445.1666 (West 2002); *id.* §§ 493.56b, 493.58-493.59, 493.62a (West 2005). State law also grants petitioner authority to investigate consumer complaints and take enforcement action if she believes that a complaint is not "being adequately pursued by the appropriate federal regulatory authority." *Id.* § 445.1663(2) (West 2002).

On January 1, 2003, Wachovia Mortgage became a wholly-owned subsidiary of Wachovia Bank. Wachovia Mortgage advised the State of Michigan that it was surrendering its mortgage lending registration in Michigan, in reliance on the principle that state-law limitations on its mortgage lending

activities are preempted by virtue of its status as an operating subsidiary of Wachovia Bank. Petitioner responded by advising that Wachovia Mortgage would no longer be authorized to conduct its mortgage lending business in Michigan. Pet. 7; Pet. App. 4a; J.A. 25a-27a, 47a-48a.

3. Respondents filed an action in the United States District Court for the Western District of Michigan, seeking declaratory and injunctive relief on the ground that the National Bank Act and the Comptroller's regulations preempt the application of the relevant Michigan mortgage lending regulations to an operating subsidiary. Pet. App. 14a; J.A. 14a-24a.

a. The district court granted summary judgment to respondents in relevant part. Pet. App. 14a-25a. Applying the two-step framework of *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), the court sustained the Comptroller's determination that an operating subsidiary's conduct of banking functions is subject to state law only to the extent that the parent bank would be if it performed the same functions. Pet. App. 18a-22a. The court also rejected petitioner's Tenth Amendment claim. *Id.* at 23a-24a.

b. The court of appeals affirmed. Pet. App. 1a-12a. Observing that a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law," the court explained that the relevant question instead is "whether the Comptroller 'has exceeded [his] statutory authority or acted arbitrarily.'" *Id.* at 7a (quoting *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 154 (1982)). Applying the *Chevron* framework in conducting that inquiry, the court first concluded that "Congress has not spoken precisely on the issue" of the extent to which state laws may be applied to a national bank operating subsidiary. *Id.* at 8a. Turning to the second step of the *Chevron* framework, the court explained that the Comptroller's regulations "reflect the eminently reasonable conclusion that when a bank chooses to utilize the authority it is granted under federal law" to con-

duct its functions through an operating subsidiary, "it ought not be hindered by conflicting state regulations." *Id.* at 11a. Finally, the court rejected petitioner's argument under the Tenth Amendment. *Id.* at 12a.

SUMMARY OF ARGUMENT

The Comptroller's regulations establish that state banking laws apply to the conduct of national bank functions through an operating subsidiary only to the extent that the laws would apply to the conduct of functions directly by the parent bank. 12 C.F.R. 5.34(e)(3), 7.4006. The regulations also establish that national banks may conduct real estate lending functions through an operating subsidiary without regard to state laws concerning licensing and registration. 12 C.F.R. 34.4(a)(1). Those regulations are valid and entitled to be given effect.

This Court has settled that the validity of a preemptive federal regulation does not rest on specific congressional authorization to displace state law. Rather, a preemptive regulation is valid as long as it is within the scope of the agency's delegated authority. See *Federal Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141 (1982). Here, the Comptroller undisputedly has authority under the National Bank Act to promulgate regulations carrying the force of law, and the relevant preemptive regulations were adopted in an exercise of that authority. Indeed, Congress has specifically recognized the Comptroller's authority to make preemption determinations under the Act. See 12 U.S.C. 43.

Contrary to petitioner's argument, Congress has not foreclosed the approach taken by the Comptroller's regulations. The Comptroller's exclusive visitorial authority over "national bank[s]," 12 U.S.C. 484(a), does not demonstrate a specific intention by Congress to foreclose the Comptroller from exercising exclusive visitorial authority over operating subsidiaries pursuant to separate statutory authority. The Comptroller's preemptive regulations do not rest on an interpretation of Section 484(a), but rather implement the Comptroller's

authority to define the scope of a national bank's "incidental powers," 12 U.S.C. 24 Seventh, and to adopt rules governing real estate lending activity, 12 U.S.C. 371(a).

The Comptroller's regulations represent a reasonable accommodation of policies committed to the agency by the Act. See *De la Cuesta*, 458 U.S. at 153-154. It is undisputed that the Comptroller acted reasonably in determining that national banks' incidental powers include the performance of banking functions through operating subsidiaries. The Comptroller also acted reasonably in the closely related determination that, insofar as a national bank elects to conduct its functions through an operating subsidiary, state law limitations will apply only to the extent that they would apply to the parent bank. Congress implicitly ratified that result in recognizing that the performance of functions through an operating subsidiary is subject to the "same terms and conditions" that would govern the conduct of the same functions directly by the parent bank. 12 U.S.C. 24a(g)(3)(A). The Comptroller's rules also reflect the settled principle that the grants of both enumerated and incidental powers to national banks ordinarily preempt any state law limitations. *Barnett Bank of Marion County, N.A.*, v. *Nelson*, 517 U.S. 25, 32 (1996).

Petitioner errs in arguing that a presumption against preemption weighs against giving effect to the Comptroller's regulations. That presumption has no application in an area in which there has been a significant federal presence from the outset, as is plainly the case with respect to regulation of national banks. Nor is there any merit to petitioner's contention that agency preemption determinations are categorically ineligible for judicial deference. That argument directly contradicts this Court's precedents, and overlooks agencies' unique expertise to assess whether displacement of state law is warranted in furtherance of a federal regulatory scheme.

Even aside from the preemptive effect of the Comptroller's regulations, the state laws at issue would be preempted

by the National Bank Act because they impair the exercise of a national bank's undisputed power to conduct its functions through an operating subsidiary. The Court has held that, where national banks are granted an express or incidental power by the National Bank Act, state law limitations on that power do not apply in the absence of congressional specification to that effect. *Barnett Bank*, 517 U.S. at 32-34.

ARGUMENT

I. THE COMPTROLLER'S REGULATIONS VALIDLY PREEMPT THE APPLICATION OF STATE BANKING LAWS TO AN OPERATING SUBSIDIARY

From its enactment, the National Bank Act has embodied the principle that "the States can exercise no control over" national banks, "nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Farmers' & Mechanics Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875). It is undisputed that the National Bank Act would preempt the application to a national bank of state laws of the type at issue here. It is also undisputed that a national bank's powers under the Act include the power to conduct its functions through an operating subsidiary.

Against that backdrop, the Comptroller reasonably determined that, when a national bank exercises its authority to conduct banking functions through an operating subsidiary, state banking laws apply only to the extent they would apply if the same functions were performed directly by the bank. The Comptroller also acted reasonably in determining that national banks may exercise through an operating subsidiary their express authority to engage in real estate lending without regard to state laws concerning licensing and registration. Those determinations by the Comptroller have been sustained, without dissent, by every court of appeals to address the issue. See Pet. App. 1a-12a; *National City Bank* v. *Turnbaugh*, 463 F.3d 325 (4th Cir. 2006); *Wachovia Bank*,

N.A. v. *Burke*, 414 F.3d 305 (2d Cir. 2005), petition for cert. pending, No. 05-431 (filed Sept. 30, 2005); *Wells Fargo Bank N.A.* v. *Boutris*, 419 F.3d 949 (9th Cir. 2005). This Court should reach the same conclusion.

A. The Comptroller's Regulations Are A Reasonable Exercise Of His Authority Under The National Bank Act

It is long settled that "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982); accord *United States* v. *Locke*, 529 U.S. 89, 109-110 (2000); *City of New York* v. *FCC*, 486 U.S. 57, 63-64 (1988); *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 369 (1986). As this Court has unanimously recognized, moreover, a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law," and "a narrow focus on Congress' intent to supersede state law" is thus "misdirected." *City of New York*, 486 U.S. at 64 (quoting *De la Cuesta*, 458 U.S. at 154). "Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to take such action." *Ibid.* Consequently, "even in the area of pre-emption, if the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute," the Court will "not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Ibid.* (internal quotation marks and citation omitted); see *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984).

When reviewing preemptive regulations like those at issue here, the Court examines two questions: (i) whether the regulations are intended to preempt the state laws in question; and (ii) if so, whether the regulations are "within the scope of the [agency's] delegated authority." *De la Cuesta*, 458 U.S. at 154; see *City of New York*, 486 U.S. at 64; *Crisp*, 467 U.S. at

700. Here, the Comptroller's regulations plainly preempt the Michigan restrictions at issue, and are well within the Comptroller's statutory authority.

1. The Comptroller's regulations preempt application of the Michigan laws to an operating subsidiary

Three separate regulations preempt application of the pertinent Michigan laws to a national bank's operating subsidiary. First, 12 C.F.R. 5.34(e)(3) provides that an "operating subsidiary conducts activities * * * pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." Accord 12 U.S.C. 24a(g)(3)(A). An integral aspect of the "terms and conditions" under which a national bank conducts its functions is the extent to which its operations are subject to state law. See 12 C.F.R. 7.4009(b). An operating subsidiary subject to a host of state regulations inapplicable to the parent bank could hardly be said to operate under the same terms and conditions. Therefore, the Comptroller reasonably construes Section 5.34(e)(3) to establish that an operating subsidiary conducts its activities subject only to the "same * * * terms and conditions" of state law as the parent national bank. See 66 Fed. Reg. 34,784, 34,788 (2001).

Second, the Comptroller expressly addressed the preemption issue in 12 C.F.R. 7.4006, which prescribes that, except as "otherwise provided by Federal law or OCC regulation, state laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." Because it is undisputed that Michigan's registration requirements and associated laws could not be applied to a national bank, Section 7.4006 prohibits application of those restrictions to an operating subsidiary.[1]

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[1] Petitioner suggests (Br. 32, 36) that the Comptroller did not intend Section 7.4006 to have preemptive force, but that the provision instead merely predicts how courts would rule on whether the National Bank Act preempts state law.

Finally, the Comptroller's regulations governing real estate lending separately establish that state laws like the registration requirements in issue cannot be applied to a national bank's conduct of mortgage lending functions through an operating subsidiary. The regulations provide that "a national bank may make real estate loans * * * without regard to state law limitations concerning" a number of specified subjects, including "[l]icensing and registration." 12 C.F.R. 34.4(a)(1). And the Comptroller expressly determined that the regulation's preemptive effect "applies to national banks and their operating subsidiaries." 12 C.F.R. 34.1(b).

2. *The Comptroller's regulations are a reasonable exercise of his delegated authority*

The Comptroller's preemptive regulations are well "within the scope of [his] delegated authority" under the Act. *De la Cuesta*, 458 U.S. at 154; see *City of New York*, 486 U.S. at 64, 66. In unanimously reaching that conclusion, the courts of appeals have found the applicable regulations to be valid under the two-step framework set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-

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The plain terms of the provision refute that reading. Petitioner's argument relies on the Comptroller's observations concerning whether Section 7.4006 would have federalism implications for purposes of Executive Order No. 13,132, 3 C.F.R. 206 (2000). The Comptroller stated that Section 7.4006 "*itself* does not effect preemption" for purposes of that Executive Order. 66 Fed. Reg. at 34,790 (emphasis added). That observation merely reflected the Comptroller's view that pre-existing law—in particular, 12 C.F.R. 5.34(e)(3)—*already* preempted state regulation of operating subsidiaries; Section 7.4006 was intended to "clarif[y]" that preemptive effect. 66 Fed. Reg. at 34,788. Any doubt concerning Section 7.4006's preemptive force is erased by the Comptroller's explanation that, even if Section 7.4006 *did* add to the scope of preemption under pre-existing law, the agency had complied with Executive Order No. 13,132. 66 Fed. Reg. 34,790. And any ambiguity on the matter would be beside the point in view of the Comptroller's present reaffirmation of Section 7.4006's preemptive effect. See *Auer* v. *Robbins*, 519 U.S. 452, 461-463 (1997).

845 (1984). See Pet. App. 7a; *Turnbaugh*, 463 F.3d at 331; *Burke*, 414 F.3d at 314-315; *Boutris*, 419 F.3d at 958-959.[2]

a. The Comptroller promulgated the regulations pursuant to his authority to adopt binding rules

i. This Court has held that an agency's regulations are binding under *Chevron* when, *inter alia*, "Congress delegated authority to the agency generally to make rules carrying the force of law" and "the agency interpretation * * * was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001). The Comptroller unquestionably possesses authority under the Act to promulgate binding regulations. See *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996); *Nationsbank of N.C., N.A.* v. *Variable Life Ins. Co.*, 513 U.S. 251, 256-257, 258-259 n.2 (1995). The Comptroller has general authority "to prescribe rules and regulations to carry out [his] responsibilities." 12 U.S.C. 93a. See also 12 U.S.C. 1, 26-27, 1818(b).

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[2] Where, as here, an agency acts under an explicit grant of authority to promulgate legislative rules having the force of law, "[s]uch legislative regulations" are generally "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. *Chevron* also explains that, when an agency exercises implicitly delegated authority to construe "a statutory scheme it is entrusted to administer," the agency's interpretation is binding as long as it is "a reasonable interpretation." *Ibid.* The latter inquiry parallels the approach taken by this Court in assessing whether an agency's preemptive regulations fall within the scope of its delegated statutory authority. Compare *Chevron*, 467 U.S. at 844-845 (quoting *United States* v. *Shimer*, 367 U.S. 374, 382-383 (1961)), with *Crisp*, 467 U.S. at 699-700 (same); *De la Cuesta*, 458 U.S. at 154 (same). Under both *Chevron*'s reasonableness framework and *De la Cuesta*, the question ultimately is whether the agency's rule reflects "a reasonable accommodation of conflicting polices * * * committed to the agency's care by the statute" or instead is "not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845; accord *Crisp*, 467 U.S. at 700; *De la Cuesta*, 458 U.S. at 154. The Comptroller's preemptive regulations clearly satisfy that reasonableness test, and *a fortiori* would satisfy the arbitrary-and-capricious test generally applied to legislative regulations.

Of particular significance, the Comptroller possesses authority to define the scope of a national bank's "incidental powers" under 12 U.S.C. 24 Seventh, see *Nationsbank*, 513 U.S. at 256-257, 258-259 n.2, including the power to conduct banking functions through an operating subsidiary. The Comptroller relied on that authority in promulgating 12 C.F.R. 5.34(e)(3) and 7.4006. See 12 C.F.R. 5.34(a); 66 Fed. Reg. at 8181. The Comptroller also has express authority to adopt regulations governing the conduct of real estate lending activity. 12 U.S.C. 371(a). The Comptroller invoked that authority in prescribing that national banks and operating subsidiaries may engage in real estate lending without regard to state laws concerning, *inter alia*, licensing and registration. 12 C.F.R. 34.4(a)(1); see 69 Fed. Reg. at 1905.

The relevant preemptive regulations thus were promulgated in an exercise of the Comptroller's authority to establish rules carrying the force of law. See *Mead*, 533 U.S. at 227. Each of the regulations was adopted pursuant to notice-and-comment rulemaking procedures, see 65 Fed. Reg. 12,911 (2000) (12 C.F.R. 5.34(e)(3)); 66 Fed. Reg. at 34,792 (12 C.F.R. 7.4006); 69 Fed. Reg. at 1917 (12 C.F.R. 34.4), which is "significant * * * in pointing to *Chevron* authority," *Mead*, 533 U.S. at 231. The plain terms of the preemptive regulations further confirm that they are intended to establish binding rules. See 12 C.F.R. 5.34(e)(3), 7.4006, 34.4(a)(1).[3]

ii. Petitioner does not deny the Comptroller's settled authority to adopt rules carrying the force of law. He contends (Br. 33-34), however, that the Comptroller lacks power to promulgate preemptive rules like those at issue here because the general conferral of rulemaking authority in 12 U.S.C. 93a

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[3] While the formality of the regulations at issue here strengthens the case for deference, the Court has recognized that the Comptroller's administration of the National Bank Act merits *Chevron* deference even in the absence of "administrative formality" such as notice-and-comment rulemaking. *Mead*, 533 U.S. at 231 & n.13; see *Nationsbank*, 513 U.S. at 256-260.

does not include a "specific authorization" to preempt state law. That argument is irreconcilable with this Court's precedents, which conclusively establish that a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *City of New York*, 486 U.S. at 64 (quoting *De la Cuesta*, 458 U.S. at 154).[4]

Even leaving aside the settled principle that no specific authorization to displace state law is required, any suggestion that the Comptroller's authority fails to encompass matters of preemption is refuted by 12 U.S.C. 43. That provision states that, "[b]efore issuing any opinion letter or interpretive rule * * * that concludes that Federal law preempts the application to a national bank of any State law regarding community investment, consumer protection, fair lending, or the establishment of intrastate branches," the Comptroller must adhere to certain notice-and-comment procedures, 12 U.S.C. 43(a), and must publish in the Federal Register any "opinion letter or interpretive rule concluding that Federal law preempts the application of [such] State law," 12 U.S.C. 43(b)(1). While the regulations at issue here are more than "interpretive rules" or "opinion letters" under Section 43—they instead are full-dress regulations issued under notice-and-comment rulemaking procedures—Section 43 reflects Congress's recognition of the Comptroller's ample authority to preempt state law.

Section 43 also confirms that the Comptroller's exercise of authority to preempt state law is subject to congressional oversight and is a matter that Congress has addressed. In

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[4] Petitioner's cramped reading of Section 93a is groundless in any event. Section 93a grants the Comptroller broad authority "to prescribe rules and regulations to carry out [his] responsibilities." 12 U.S.C. 93a. That grant of authority encompasses any statute administered by the Comptroller, and the breadth of the Comptroller's rulemaking authority is made clear when it is juxtaposed against the specific exclusions set forth in the provision, *i.e.*, for branching and "securities activities of National Banks." *Ibid.*; see *Conference of State Bank Supervisors* v. *Conover*, 710 F.2d 878, 885 (D.C. Cir. 1983).

this context, accordingly, there is all the more reason to apply the settled principle that a grant of rulemaking authority to an agency contains no carve-out for matters of preemption. See, *e.g.*, *City of New York*, 486 U.S. at 64; *De la Cuesta*, 458 U.S. at 153-154. Indeed, in addition to Section 43, Congress also enacted 15 U.S.C. 6714, which provides that, in a conflict between state authorities and the Comptroller on whether "any insurance sales or solicitation activity is properly treated as preempted under Federal law," a reviewing court should decide the issue "without unequal deference" to the Comptroller's views. 15 U.S.C. 6714(a) and (e). Congress specified that Section 6714's prohibition against giving the Comptroller "unequal deference" does not apply—and that the Comptroller thus should continue to receive deference—with respect to whether certain state insurance laws enacted before September 3, 1998, are preempted by federal law. 15 U.S.C. 6701(d)(2)(C)(i) (entitled "OCC deference"). Those provisions not only evidence Congress's authorization and active oversight of the Comptroller's preemption determinations, but they also show that, when Congress intends a departure from normal principles of judicial deference to those determinations, Congress says so explicitly.

b. Congress has not directly addressed the preemption rules that apply to operating subsidiaries

The threshold question under *Chevron* and *De la Cuesta* is whether Congress has spoken directly to the issue addressed by the agency—here, the extent to which state banking regulations apply to the conduct of banking functions through an operating subsidiary. The answer to that question is clear: Congress has not specifically addressed the issue.

Petitioner contends (Br. 12-16) that Congress specifically addressed the issue in 12 U.S.C. 484(a), which addresses visitorial powers over national banks. Petitioner notes that Section 484(a) by terms establishes the Comptroller's exclu-

sive visitorial authority only with respect to a "national bank," and infers that the Comptroller therefore lacks authority to preempt state regulation of operating subsidiaries. Visitorial powers, however, principally concern the supervision and enforcement—through investigations and the like—of applicable state and federal restrictions, see 12 C.F.R. 7.4000(a)(2)(i)-(iv), not the question whether such restrictions apply in the first place. In adopting the preemptive regulations at issue, the Comptroller did not purport to construe or apply the term "national bank" in 12 U.S.C. 484(a). The Comptroller instead grounded the regulations on his authority over national banks' incidental powers, 12 U.S.C. 24 Seventh, and over their conduct of real estate lending functions, 12 U.S.C. 371(a). The regulations thus bar application of the Michigan registration requirements to an operating subsidiary entirely apart from any questions concerning the scope of Section 484(a). See, *e.g.*, 12 C.F.R. 34.4(a)(1).

With respect to visitorial powers, moreover, the Comptroller validly concluded that, by operation of 12 C.F.R. 7.4006, Section 484(a)'s limitations on state visitorial authority apply to an operating subsidiary. See 69 Fed. Reg. at 1900-1901. That conclusion is not at odds with Section 484(a)'s reference to a "national bank." That reference does not dictate that state authorities—who otherwise lack visitorial powers over national bank operations—must be given visitorial authority over national bank functions whenever a bank exercises its federal right to perform those functions through an operating subsidiary. Section 484(a) was enacted in 1864 in the original National Bank Act, and has remained materially unchanged. See Act of June 3, 1864, ch. 106, § 54, 13 Stat. 116. It was not until one century later that the Comptroller first promulgated regulations recognizing national banks' power to perform their functions through an operating subsidiary. See 31 Fed. Reg. 11,459 (1966). The reference to a "national bank" in Section 484(a) thus could not have been intended to foreclose the

Comptroller from applying the provision's protections to the conduct of national bank functions through an "operating subsidiary," a concept that did not exist when Section 484(a) was enacted. Congress simply did not speak to the question whether, or to what extent, state registration requirements may be applied to an operating subsidiary.

Petitioner also errs in relying (Br. 13-14) on the term "affiliate" in 12 U.S.C. 481. Section 481 does not address the exercise of state visitorial authority over a national bank "affiliate." And whatever may be the implications of Section 481 for state visitorial authority over an "affiliate," Congress's use of the general term "affiliate" in no way signals a specific intention concerning treatment of an operating subsidiary. An "affiliate" includes "any corporation" controlled by a national bank, including a subsidiary. 12 U.S.C. 221a(b). An operating subsidiary thus qualifies as an "affiliate." But an operating subsidiary may engage only in the business of banking as authorized by the National Bank Act, whereas other "affiliates" may engage in functions not authorized by the Act. Provisions generally addressing "affiliates" thus shed little light on the specific treatment of operating subsidiaries.[5]

c. The Comptroller reasonably determined that the Michigan laws at issue should not apply to an operating subsidiary

The final question under *De la Cuesta* and *Chevron* is whether the challenged regulations represent a reasonable accommodation of policies committed to the agency. See *De*

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[5] Contrary to petitioner's argument (Br. 16-17), nothing in the Alternative Mortgage Transaction Parity Act of 1982 (Parity Act), 12 U.S.C. 3801 *et seq.*, suggests that Congress has directly addressed the preemption rules that apply to operating subsidiaries. The Parity Act addresses issuance of adjustable-rate mortgage loans (ARM loans) by state-chartered housing creditors, but does not apply to national banks or their operating subsidiaries, which conduct all of their functions (including, as may be relevant, issuance of ARM loans) under the National Bank Act, not the Parity Act.

la Cuesta, 458 U.S. at 153-154; *Chevron*, 467 U.S. at 844-845. The Comptroller's regulations readily satisfy that standard.

i. Initially, petitioner does not dispute (Br. 21) that the Comptroller acted reasonably in determining that national banks' "incidental powers" under 12 U.S.C. 24 Seventh should include the performance of functions through an operating subsidiary The Comptroller has made clear since 1966 that national banks have that power. 12 C.F.R. 5.34; 31 Fed. Reg. at 11,459. The operating subsidiary principle not only is long-standing, but also is an integral feature of banking practice that is not unique to national banks—it also applies to state member banks and federal savings associations under regulations adopted by the Federal Reserve Board and the Office of Thrift Supervision (OTS). See 12 C.F.R. 223.3(w), 225.2(e)(2), 250.141(c), 559.3(n). Indeed, some of this Court's decisions addressing national bank functions have involved operating subsidiaries. See *Nationsbank*, 513 U.S. at 254; *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 390-391 (1987).

The Comptroller explained the basis for enabling the use of operating subsidiaries when first recognizing that power:

> The use of [operating subsidiaries] provides national banks with additional options in structuring their businesses. National banks may desire to exercise such option for many reasons, including controlling operations costs, improving effectiveness of supervision, more accurate determination of profits, decentralizing management decisions or separating particular operations of the bank from other operations.

31 Fed. Reg. at 11,460. The use of an operating subsidiary can "enhance the safety and soundness of conducting new activities by distinguishing the subsidiary's activities from those of the parent bank (as a legal matter) and allowing more focused management and monitoring." 61 Fed. Reg. at 60,354. For instance, an operating subsidiary can enable

maintenance of distinct compensation schemes or specialized business standards; promote branding under separate corporate names; facilitate the sale or purchase of a business unit as a distinct subsidiary; permit regulators in a particular industry (*i.e.*, securities or insurance) to examine the regulated functions in a subsidiary without exposing other bank operations; and allow control of risks and liabilities associated with distinct functions.

ii. The Comptroller's reasonable determination to afford national banks the power to perform banking functions through an operating subsidiary bears a "close and logical" connection to the determination that state laws are preempted with respect to an operating subsidiary to the same extent as with respect to the parent bank. *Boutris*, 419 F.3d at 962. Indeed, Congress implicitly ratified that result when it enacted 12 U.S.C. 24a(g)(3)(A) as part of the Gramm-Leach-Bliley Act (GLBA), Pub. L. No. 106-102, § 121(a)(2), 113 Stat. 1378. That provision confirms Congress's understanding that, when a national bank controls a subsidiary that "engages solely in activities that national banks are permitted to engage in directly"—*i.e.*, an operating subsidiary—the activities will be "conducted subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. 24a(g)(3)(A); see also 12 U.S.C. 24a(a)(2)(A)(ii) (authorizing national bank to control a "financial subsidiary," which may engage, in part, in "activities that are permitted for national banks to engage in directly (subject to the same terms and conditions that govern the conduct of the activities by a national bank)"). Congress's understanding that the exercise of national bank functions through an operating subsidiary would be subject to the "same terms and conditions that govern the conduct of such activities" by the parent bank, 12 U.S.C. 24a(g)(3)(A), fortifies the reasonableness of the Comptroller's determination that an operating subsidiary should be subject only to the same terms and conditions of

state law as the parent bank. See 12 C.F.R. 5.34(e)(3), 7.4006.[6]

The reasonableness of the Comptroller's determination is further confirmed by the history and context of the National Bank Act. With particular respect to "grants of both enumerated and incidental 'powers' to national banks," there is a settled "history * * * of interpreting" the "grants of authority [as] not normally limited by, but rather ordinarily preempting, contrary state law." *Barnett Bank of Marion County, N.A.*, v. *Nelson*, 517 U.S. 25, 32 (1996). Against that background, it was entirely reasonable for the Comptroller to conclude that, when a national bank exercises its power to conduct banking functions through an operating subsidiary, the performance of those functions should no more be constrained by state law than if conducted by the parent bank. See *id.* at 34; see also 12 C.F.R. 559.3(n)(3) (OTS regulation reaching same conclusion for operating subsidiaries of federal savings associations).

By contrast, subjecting an operating subsidiary to state regulations that could not be applied to the parent bank would impair a national bank's exercise of its longstanding authority to conduct its functions through an operating subsidiary, potentially deterring the bank from realizing the efficiencies that could be afforded thereby. As the Comptroller explained:

> The application of multiple, often unpredictable, different state or local restrictions and requirements prevent [national banks] from operating in the manner authorized under Federal law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and poten-

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[6] The Senate Report on GLBA explained that, "[f]or at least 30 years, national banks have been authorized to invest in operating subsidiaries that are engaged only in activities that national banks may engage in directly," and "[n]othing in [GLBA] is intended to affect [that] authority." S. Rep. No. 44, 106th Cong., 1st Sess. 8 (1999).

> tial exposure. In some cases, this deters them from making certain products available in certain jurisdictions.

69 Fed. Reg. at 1908. The Comptroller thus issued the regulations "in furtherance of [his] responsibility to enable national banks to operate to the full extent of their powers under Federal law, without interference from inconsistent state laws, consistent with the national character of the national banking system, and in furtherance of their safe and sound operations." *Ibid.*

For those reasons, the Comptroller's preemptive regulations "represent[] a reasonable accommodation of conflicting policies that were committed to the agency's care by statute." *Chevron*, 467 U.S. at 845 (citation omitted); *De la Cuesta*, 458 U.S. at 154. They therefore should be given effect.[7]

3. Petitioner's arguments for declining to give effect to the Comptroller's regulations are without merit

a. Any presumption of non-preemption is inapplicable in the context of this case

Petitioner errs in arguing (Br. 25-26) that giving effect to the Comptroller's regulations would conflict with a "presumption against preemption." First, an "'assumption' of nonpreemption is not triggered when the State regulates in an area in which there has been a history of a significant federal presence." *Locke*, 529 U.S. at 108. Regulation of national banks is quintessentially such an area. Soon after the National Bank Act was enacted, the Court explained that the "spirit of all the legislation" is that "National banks have been National favor-

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[7] Contrary to petitioner's argument (Br. 17-20), the Comptroller's regulations do not impermissibly disregard principles of corporate separateness. Rather, the Comptroller has reasonably concluded that an operating subsidiary affords "a convenient and useful form for conducting activities that the parent bank could conduct directly," 66 Fed. Reg. at 34,788, and that the federal entitlement to conduct federally authorized functions through an operating subsidiary should not be unduly impaired by state law.

ites," and it "could not have been intended * * * to expose them to the hazard of unfriendly legislation by the States." *Tiffany* v. *National Bank*, 85 U.S. (18 Wall.) 409, 413 (1874). Indeed, this Court has recognized that the "grants of both enumerated and incidental 'powers' to national banks" involve a presumption in *favor* of preemption, in that those grants are "not normally limited by, but rather ordinarily pre-empt[], contrary state law." *Barnett Bank*, 517 U.S. at 32.

More generally, the Court has explained that the presumption against preemption may apply "when a controversy concerns *not* the scope of the Federal Government's authority to displace state action, but rather *whether* a given state authority conflicts with, and thus has been displaced by," federal law. *New York* v. *FERC*, 535 U.S. 1, 17-18 (2002) (emphasis added). Accordingly, in a case like this one involving a clearly preemptive federal regulation and a clearly preempted state law, the relevant legal question concerns only "the rule that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority," and the "case does not involve a presumption against pre-emption." *Id.* at 18 (internal quotation marks and citation omitted). The Court instead "must interpret the statute to determine whether Congress has given [the agency] the power to act as it has," and must "do so without any presumption one way or the other." *Ibid.*; see *Conover*, 710 F.2d at 882. As detailed above, the Comptroller has clearly acted within his delegated authority here.

***b. There is no basis for categorically excepting preemptive regulations from deference under* Chevron**

Petitioner asserts (Br. 31-35) that agency rules preempting state laws are categorically ineligible for analysis under principles of deference recognized in *Chevron*. Petitioner's argument is squarely at odds with the *De la Cuesta* line of cases, but she suggests (Br. 34) that this Court has departed

from *De la Cuesta* in its post-*Chevron* decisions. To the contrary, however, the Court unanimously reaffirmed *De la Cuesta* in its post-*Chevron* decision in *City of New York* v. *FCC*, *supra*; see also *New York* v. *FERC*, 535 U.S. at 18-21. None of the post-*Chevron* decisions cited by petitioner calls into question the applicability of the *De la Cuesta* framework when examining an expressly preemptive regulation adopted in the exercise of an agency's delegated authority.[8]

Petitioner argues (Br. 32-33) that *Chevron* should not apply to preemptive regulations because the question whether state laws conflict with a federal regulatory scheme so as to warrant preemption is better suited to resolution by a court than an agency. The *De la Cuesta* line of cases is rooted in precisely the opposite conclusion, however, and with good reason. When an agency concludes, in an exercise of delegated *policymaking* authority, that displacement of state law is warranted in furtherance of a federal statute that it is entrusted to administer, the agency is acting within the core of its expertise. *E.g.*, *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 496

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[8] Petitioner relies (Br. 34) on *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), and *Louisiana Public Service Comm'n*, *supra*. *Geier*, however, raised a question of implied conflict preemption and thus involved no expressly preemptive regulation, a distinction emphasized by the dissent in *Geier* as a reason to decline to find preemption in that case. 529 U.S. at 906 (Stevens, J., dissenting). *Medtronic* raised a question of statutory rather than regulatory preemption, and the agency construed the statute as *not* giving rise to preemption, a view to which the Court attached "substantial weight." 518 U.S. at 496 (citing *Chevron*). In *Louisiana Public Service Comm'n*, the Court reaffirmed the *De la Cuesta* framework, but concluded that the FCC's preemptive order exceeded the scope of its authority. 476 U.S. at 368-376. Petitioner also relies (Br. 31) on the Court's statement in *Smiley* that it would "assume (*without deciding*)" that "the question of *whether* a statute is pre-emptive * * * must always be decided *de novo* by the courts." 517 U.S. at 744 (first emphasis added). That statement is obviously not a holding, and in any event is addressed to an agency's assessment of whether a *statute* gives rise to preemption, not to a preemptive *regulation* adopted in an exercise of delegated authority.

(1996) ("agency is uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'") (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); *id.* at 506 (Breyer, J., concurring) (agency has "special understanding of * * * whether (or the extent to which) state requirements may interfere with federal objectives"); *City of New York*, 486 U.S. at 69; *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 721 (1985). Here, for instance, the Comptroller relied on the agency's "experience with the types of state laws that can materially affect and confine—and thus are inconsistent with—the exercise of national banks' real estate lending powers." 69 Fed. Reg. at 1911. There is thus no basis for categorically declining to apply normal principles of deference to an agency's determination that preemption is warranted as a matter of federal policy. See *City of New York*, 486 U.S. at 64. That is especially true with respect to preemption determirations by the Comptroller, as to which Congress has demonstrated full awareness and active oversight. See pp. 15-16, *supra*.

Of course, courts retain ultimate authority to ensure that an agency has acted within its delegated authority and that its preemption rules are reasonable in light of the statutory scheme. See *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368-376 (invalidating preemptive order as exceeding the scope of the agency's delegated authority). There is no basis in this case, however, for declining to give effect to the Comptroller's regulations on that ground. That is particularly so in light of the narrow scope of the preemption determinations at issue. This case comes to the Court on the understanding that the relevant state laws could not be applied to a national bank; and the Comptroller has determined that those state laws also do not apply to an operating subsidiary. The Court therefore need not address any questions concerning the threshold

question of preemption vis-a-vis the national bank, or the degree of deference owed to the Comptroller on that issue. As to the ensuing question of preemption vis-a-vis an operating subsidiary, a natural and necessary incident of the Comptroller's conceded authority to give national banks the power to perform functions through an operating subsidiary is the authority to define the contours of that power, including the applicability of any state law limitations.

c. Petitioner's policy reasons for applying state law do not cast doubt on the Comptroller's regulations

Petitioner argues that States should be permitted to apply their banking laws to operating subsidiaries because States have a substantial interest in protecting their citizens from abusive lending practices. Pet. Br. 5-6, 23-26. But petitioner does not dispute that the state laws at issue would not apply to real estate lending by a national bank itself, and the Comptroller has rejected any suggestion that the "likelihood of unsafe and unsound practices * * * are significantly greater when banks operate through subsidiary corporations." 31 Fed. Reg. at 11,460. Moreover, the Comptroller has found "no reason to believe that [abusive] practices are occurring in the national banking system to any significant degree." 69 Fed. Reg. at 1914. Insofar as abuses do occur in the national banking system, the OCC "has ample legal authority and resources to ensure that consumers are adequately protected." *Id.* at 1915. In any event, petitioner's policy concerns are beside the point. When a federal agency acting within its authority has concluded that preemption is warranted as a matter of federal policy, "it is neither [a court's] function, nor within [its] expertise, to evaluate the * * * soundness of the [agency's] approach." *De la Cuesta*, 458 U.S. at 169-170.

B. The Michigan Laws Are Also Preempted By The National Bank Act

Even leaving aside the effect of the Comptroller's preemptive regulations, the Michigan laws are preempted by the National Bank Act itself because they frustrate achievement of the Act's purposes. See *Barnett Bank*, 517 U.S. at 31-37. The Michigan laws impair the ability of a national bank to exercise its federal powers by conditioning the bank's ability to perform real estate lending through an operating subsidiary on obtaining registration with the State, and by subjecting the bank's conduct of real estate lending through an operating subsidiary to the State's investigative and enforcement machinery. The impairment is especially pronounced because what is ultimately at stake is the applicability of varying registration and enforcement regimes imposed by the 50 States. See *Easton* v. *Iowa*, 188 U.S. 220, 229 (1903) (federal legislation on national banks "has in view the erection of a system throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States").

Those restrictions are preempted by the National Bank Act under the rationale of this Court's decisions. In *Barnett Bank*, the Court held that a Florida law prohibiting national banks from selling insurance was preempted by a provision of the National Bank Act permitting national banks to sell insurance in small towns, 12 U.S.C. 92. Reviewing the history of the Act and the Court's decisions, the Court explained that, "where Congress has not expressly conditioned the grant of 'power'" to a national bank "upon a grant of state permission, the Court has ordinarily found that no such condition applies." 517 U.S. at 34. In this case, likewise, by virtue of the Act's grant of incidental powers to national banks, banks have the the power to conduct real estate lending through an operating

subsidiary, and there is no indication that exercise of that power is subject to state permission or state-imposed conditions. The conclusion that the Act preempts state-imposed conditions on exercise of that power is fortified by Congress's express understanding that operating subsidiaries conduct banking functions "subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. 24a(g)(3)(A).

The Court has made clear that the Act preempts state conditions on the exercise of national bank powers even when the conditions fall short of an outright prohibition. In *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954), the Court held that a New York law barring national banks from using the word "savings" in advertisements was preempted by the National Bank Act's authorization for banks to receive savings deposits. Although the New York law did not bar national banks from receiving savings deposits, the Court found a "clear conflict" with the National Bank Act on the ground that the law impaired a national bank's ability to advertise its savings products. *Id.* at 377-378. In this case, the Michigan laws similarly impose substantial conditions on the exercise of the power to conduct real estate lending through an operating subsidiary, including potentially preventing exercise of that power altogether by denying registration.

Finally, even aside from the question of *Chevron* deference, the agency's views on whether the statute effects preemption would be entitled to substantial weight. See *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 883 (2000); *Medtronic*, 518 U.S. at 496. The agency is uniquely positioned to assess whether state law limitations interfere with operation of the federal scheme, and the Comptroller relied on that expertise in concluding that state laws like the ones at issue here impair the exercise of authorized national bank powers. See p. 25, *supra*. The conclusion that the National Bank Act preempts application of the Michigan laws is confirmed by the

Comptroller's considered judgment that preemption is warranted to enable national banks to make full and efficient use of their statutory powers. See, *e.g.*, *First Nat'l Bank* v. *California*, 262 U.S. 366, 369 (1923) ("[A]ny attempt by a state to define [national banks'] duties or control the conduct of their affairs is void whenever," *inter alia*, it "impairs the efficiency of the bank to discharge the duties for which it was created.").

II. THE TENTH AMENDMENT DOES NOT BAR THE FEDERAL GOVERNMENT FROM PREEMPTING APPLICATION OF STATE LAW TO AN OPERATING SUBSIDIARY

There is no merit to petitioner's novel argument (Br. 39-44) that the Federal Government is barred by the Tenth Amendment from preempting the application of state banking laws to an operating subsidiary. This Court has explained that, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York* v. *United States*, 505 U.S. 144, 156 (1992). Congress's commerce power plainly encompasses supervision of national banks, including their conduct of real estate lending activity. See *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 58 (2003) (per curiam). Contrary to petitioner's suggestion (Br. 39-40), this case does not implicate the anti-commandeering principle of *New York* v. *United States*, *supra*, and *Printz* v. *United States*, 521 U.S. 898 (1997). Barring Michigan from applying its mortgage lending laws to operating subsidiaries does not "compel[] state officers to execute federal laws," *id.* at 905, but instead has the reverse effect of reserving the banking regulation of operating subsidiaries primarily to federal officials and federal law.

This case thus concerns an ordinary exercise of the Federal Government's basic authority to preempt state law. Petitioner erroneously contends (Br. 43) that preempting application of the Michigan laws to an operating subsidiary would "transform State-chartered operating subsidiaries into 'crea-

tures of the federal government.'" Federal law routinely preempts the application of state laws to state-chartered corporations without raising any conceivable issue under the Tenth Amendment. *E.g.*, *Geier*, *supra* (state-chartered automobile manufacturer). Moreover, the Comptroller's regulations do not preempt application of *all* state laws, but only those laws that regulate the conduct of banking functions. See, *e.g.*, 12 C.F.R. 34.4(b)(1)-(9); 69 Fed. Reg. at 1912.

Insofar as petitioner's Tenth Amendment argument rests on the sovereign interests of an operating subsidiary's "chartering State[]" (Pet. Br. 43), it suffices to note that Wachovia Mortgage is a North Carolina corporation, not a Michigan corporation. See Pet. 5. With respect to an operating subsidiary's chartering state, moreover, nothing in the Act or the Comptroller's regulations displaces that state's laws governing the incorporation, governance, or dissolution of an operating subsidiary. For those reasons, petitioner's reliance on the Tenth Amendment—either directly or via the canon of constitutional doubt (Br. 27-28, 37-38)—is groundless.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 12 U.S.C. 24 provides, in pertinent part:

§ 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * * * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; * * * .

2. 12 U.S.C. 24a provides, in pertinent part:

§ 24a. Financial subsidiaries of national banks

(a) Authorization to conduct in subsidiaries certain activities that are financial in nature

(1) In general

Subject to paragraph (2), a national bank may control a financial subsidiary, or hold an interest in a financial subsidiary.

(2) Conditions and requirements

A national bank may control a financial subsidiary, or hold an interest in a financial subsidiary, only if—

(A) the financial subsidiary engages only in—

(i) activities that are financial in nature or incidental to a financial activity pursuant to subsection (b) of this section; and

(ii) activities that are permitted for national banks to engage in directly (subject to the same terms and conditions that govern the conduct of the activities by a national bank);

* * * * *

(g) Definitions

For purposes of this section, the following definitions shall apply:

* * * * *

(3) Financial subsidiary

The term "financial subsidiary" means any company that is controlled by 1 or more insured depository institutions other than a subsidiary that—

(A) engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks; or

* * * * *

3. 12 U.S.C. 43 provides, in pertinent part:

§ 43. Interpretations concerning preemption of certain State laws

(a) Notice and opportunity for comment required

Before issuing any opinion letter or interpretive rule, in response to a request or upon the agency's own motion, that concludes that Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches, or before making a determination under section 36(f)(1)(A)(ii) of this title, the appropriate Federal banking agency (as defined in section 1813 of this title) shall—

(1) publish in the Federal Register notice of the preemption or discrimination issue that the agency is considering (including a description of each State law at issue);

(2) give interested parties not less than 30 days to submit written comments; and

(3) in developing the final opinion letter or interpretive rule issued by the agency, or making any determination under section 36(f)(1)(A)(ii) of this title, consider any comments received.

(b) Publication required

The appropriate federal banking agency shall publish in the Federal Register—

(1) any final opinion letter or interpretive rule concluding that Federal law preempts the application of any State law regarding community reinvestment, consumer protection, fair lending, or establishment of intrastate branches to a national bank; and

(2) any determination under section 36(f)(1)(A)(ii) of this title.

(c) Exceptions

(1) No new issue or significant basis

This section shall not apply with respect to any opinion letter or interpretive rule that—

(A) raises issues of Federal preemption of State law that are essentially identical to those previously resolved by the courts or on which the agency has previously issued an opinion letter or interpretive rule; or

(B) responds to a request that contains no significant legal basis on which to make a preemption determination.

(2) Judicial, legislative, or intragovernmental materials

This section shall not apply with respect to materials prepared for use in judicial proceedings or submission to Congress or a Member of Congress, or for intragovernmental use.

(3) Emergency

The appropriate Federal banking agency may make exceptions to subsection (a) of this section if—

(A) the agency determines in writing that the exception is necessary to avoid a serious and imminent threat to the safety and soundness of any national bank; or

(B) the opinion letter or interpretive rule is issued in connection with—

(i) an acquisition of 1 or more banks in default or in danger of default (as such terms are defined in section 1813 of this title); or

(ii) an acquisition with respect to which the Federal Deposit Insurance Corporation provides assistance under section 1823(c) of this title.

4. 12 U.S.C. 93a provides, in pertinent part:

§ 93a. Authority to prescribe rules and regulations

Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority conferred by this section does not apply to section 36 of this title or to securities activities of National Banks under the Act commonly known as the "Glass-Steagall Act".

5. 12 U.S.C. 371 provides, in pertinent part:

§ 371. Real estate loans

(a) Authorization to make real estate loans; orders, rules, and regulations of Comptroller of the Currency

Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

* * * * *

6. 12 U.S.C. 481 provides, in pertinent part:

§ 481. Appointment of examiners; examination of member banks, State banks, and trust companies; reports

The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every national bank as often as the Comptroller of the Currency shall deem necessary. The examiner making the examination of any national bank shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency: *Provided*, That in making the examination of any national bank the examiners shall include such an examination of the affairs of all its affiliates other than member banks as shall be necessary to disclose fully the relations between such bank and such affiliates and the effect of such relations upon the affairs of such bank; and in the event of the refusal to give any information required in the course of the examination of any such affiliate, or in the event of the refusal to permit such examination, all the rights, privileges, and franchises of the bank shall be subject to forfeiture in accordance with sections 141, 222 to 225, 281 to 283, 285, 286, 501a and 502 of this title. The Comptroller of the Currency shall have power, and he is authorized, to publish the report of his examination of any national banking association or affiliate which shall not within one hundred and twenty days after notification of the recommendations or suggestions of the Comptroller, based on said examination, have complied with the same to his satisfaction. Ninety days' notice prior to such publicity shall be given to the bank or affiliate.

* * * * *

7. 12 U.S.C. 484 provides, in pertinent part:

§ 484. Limitation on visitorial powers

(a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

(b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

8. 15 U.S.C. 6701 provides, in pertinent part:

§ 6701. Operation of state law

* * * * *

(d) Activities

* * * * *

(2) Insurance sales

* * * * *

(C) Limitations

(i) OCC deference

Section 6714(e) of this title does not apply with respect to any State statute, regulation, order, interpretation, or other action regarding insurance sales, solicitation, or cross marketing activities described in subparagraph (A) that was issued,

adopted, or enacted before September 3, 1998, and that is not described in subparagraph (B).

* * * * *

9. 15 U.S.C. 6714 provides, in pertinent part:

§ 6714. Expedited and equalized dispute resolution for Federal regulators

(a) Filing in court of appeals

In the case of a regulatory conflict between a State insurance regulator and a Federal regulator regarding insurance issues, including whether a State law, rule, regulation, order, or interpretation regarding any insurance sales or solicitation activity is properly treated as preempted under Federal law, the Federal or State regulator may seek expedited judicial review of such determination by the United States Court of Appeals for the circuit in which the State is located or in the United States Court of Appeals for the District of Columbia Circuit by filing a petition for review in such court.

* * * * *

(e) Standard of review

The court shall decide a petition filed under this section based on its review on the merits of all questions presented under State and Federal law, including the nature of the product or activity and the history and purpose of its regulation under State and Federal law, without unequal deference.

10. 12 C.F.R. 5.34 provides, in pertinent part:

§ 5.34. Operating subsidiaries.

(a) *Authority.* 12 U.S.C. 24 (Seventh), 24a, 93a, 3101 *et seq.*

(b) *Licensing requirements.* A national bank must file a notice or application as prescribed in this section to acquire or establish an operating subsidiary, or to commence a new activity in an existing operating subsidiary.

* * * * *

(e) *Standards and requirements—*

(1) *Authorized activities.* A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking, as determined by the OCC, or otherwise under other statutory authority, including:

* * * * *

(3) *Examination and supervision.* An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank. If, upon examination, the OCC determines that the operating subsidiary is operating in violation of law, regulation, or written condition, or in an unsafe or unsound manner or otherwise threatens the safety or soundness of the bank, the OCC will direct the bank or operating subsidiary to take appropriate remedial action, which may include requiring the bank to divest or liquidate the operating subsidiary, or discontinue specified activities. OCC authority under this paragraph is subject to the limitations and requirements of section 45 of the Federal Deposit Insurance

Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act (12 U.S.C. 1820a).

(4) *Consolidation of figures*—(i) *National banks.* Pertinent book figures of the parent national bank and its operating subsidiary shall be combined for the purpose of applying statutory or regulatory limitations when combination is needed to effect the intent of the statute or regulation, e.g., for purposes of 12 U.S.C. 56, 60, 84, and 371d.

* * * * *

(5) *Procedures*— (i) *Application required.* (A) Except as provided in paragraph (e)(5)(iv) or (e)(5)(vi) of this section, a national bank that intends to acquire or establish an operating subsidiary, or to perform a new activity in an existing operating subsidiary, must first submit an application to, and receive approval from, the OCC.

* * * * *

11. 12 C.F.R. 7.4000 provides, in pertinent part:

§ 7.4000 Visitorial powers.

(a) *General rule.* (1) Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law. However, production of a bank's records (other than non-public OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.

(2) For purposes of this section, visitorial powers include:

(i) Examination of a bank;

(ii) Inspection of a bank's books and records;

(iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and

(iv) Enforcing compliance with any applicable federal or state laws concerning those activities.

(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.

(b) *Exceptions to the general rule.* Under 12 U.S.C. 484, the OCC's exclusive visitorial powers are subject to the following exceptions:

(1) *Exceptions authorized by Federal law.* National banks are subject to such visitorial powers as are provided by Federal law. Examples of laws vesting visitorial power in other governmental entities include laws authorizing state or other Federal officials to:

(i) Inspect the list of shareholders, provided that the official is authorized to assess taxes under state authority (12 U.S.C. 62; this section also authorizes inspection of the shareholder list by shareholders and creditors of a national bank);

(ii) Review, at reasonable times and upon reasonable notice to a bank, the bank's records solely to ensure compliance with applicable state unclaimed property or escheat laws upon reasonable cause to believe that the

bank has failed to comply with those laws (12 U.S.C. 484(b));

(iii) Verify payroll records for unemployment compensation purposes (26 U.S.C. 3305(c));

(iv) Ascertain the correctness of Federal tax returns (26 U.S.C. 7602);

(v) Enforce the Fair Labor Standards Act (29 U.S.C. 211); and

(vi) Functionally regulate certain activities, as provided under the Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

(2) *Exception for courts of justice.* National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.

(3) *Exception for Congress.* National banks are subject to such visitorial powers as shall be, or have been, exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

* * * * *

12. 12 C.F.R. 7.4006 provides, in pertinent part:

§ 7.4006 Applicability of State law to national bank operating subsidiaries.

Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.

13. 12 C.F.R. 34.1 provides, in pertinent part:

§ 34.1 Purpose and scope.

(a) *Purpose.* The purpose of this part is to set forth standards for real estate-related lending and associated activities by national banks.

(b) *Scope.* This part applies to national banks and their operating subsidiaries as provided in 12 CFR 5.34. * * * .

* * * * *

14. 12 C.F.R. 34.4 provides, in pertinent part:

§ 34.4 Applicability of state law.

(a) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks. Specifically, a national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning:

(1) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or

other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(3) Loan-to-value ratios;

(4) The terms of credit, including schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(5) The aggregate amount of funds that may be loaned upon the security of real estate;

(6) Escrow accounts, impound accounts, and similar accounts;

(7) Security property, including leaseholds;

(8) Access to, and use of, credit reports;

(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;

(11) Disbursements and repayments;

(12) Rates of interest on loans;[1]

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[1] The limitations on charges that comprise rates of interest on loans by national banks are determined under Federal law. *See* 12 U.S.C. 85 and 1735f-7a; 12 CFR 7.4001. State laws purporting to regulate national bank fees and charges that do not constitute interest are addressed in 12 CFR 7.4002.

(13) Due-on-sale clauses except to the extent provided in 12 U.S.C. 1701j-3 and 12 CFR part 591; and

(14) Covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

(b) State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' real estate lending powers:

(1) Contracts;

(2) Torts;

(3) Criminal law;[2]

(4) Homestead laws specified in 12 U.S.C. 1462a(f);

(5) Rights to collect debts;

(6) Acquisition and transfer of real property;

(7) Taxation;

(8) Zoning; and

---

[2] *But see* the distinction drawn by the Supreme Court in *Easton* v. *Iowa*, 188 U.S. 220, 238 (1903), between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States." The Court stated that "[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction * * *. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States." *Id.* at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

(9) Any other law the effect of which the OCC determines to be incidental to the real estate lending operations of national banks or otherwise consistent with the powers and purposes set out in § 34.3(a).

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(7)

No. 05-1342

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In The Supreme Court of the United States

LINDA A. WATTERS, COMMISSIONER, MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES,

Petitioner,

v.

WACHOVIA BANK, N.A., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICI CURIAE* OF AARP, CENTER FOR RESPONSIBLE LENDING, CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, FAIR HOUSING JUSTICE CENTER, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL ASSOCIATION OF CONSUMER AGENCY ADMINISTRATORS, NATIONAL COMMUNITY REINVESTMENT COALITION, NATIONAL CONSUMER LAW CENTER, PUBLIC CITIZEN, TRIAL LAWYERS FOR PUBLIC JUSTICE, U.S. PUBLIC INTEREST RESEARCH GROUP, AND PROFESSORS OF LAW* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are twelve non-profit, public interest organizations and seventeen law professors concerned about protecting consumers from abuses in the marketplace. In their work on behalf of consumers and their scholarship, *amici curiae* have witnessed the primary role that states have played in enacting and enforcing laws to protect consumers from financial institutions' abusive practices. Over the past few years, the Office of the Comptroller of the Currency ("OCC") has sought to immunize state-chartered operating subsidiaries of national banks from the reach of numerous state laws and state law enforcement. The interest of *amici curiae* in this case stems from their desire to ensure that customers of state-chartered operating subsidiaries benefit from the critical protections afforded by state law and state officials' enforcement efforts.

STATEMENT OF THE CASE

In this case, respondents seek to prohibit petitioner, the Commissioner of the Michigan Office of Insurance and Financial Services, from enforcing Michigan's mortgage laws against respondent Wachovia Mortgage, a state-chartered national bank operating subsidiary. The bases for respondents' action are sweeping, interconnected rules promulgated by the OCC in the past six years that have

[1] A letter of consent from each of the parties has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

dramatically undermined the states' ability to protect their consumers from abuses by national bank operating subsidiaries.

The OCC's 2001 operating subsidiary preemption rule at the heart of this case provides that, "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R. § 7.4006. In turn, this implicates the current "visitorial powers" rule, 12 C.F.R. § 7.4000, in which the OCC redefined its own exclusive jurisdictional reach under 12 U.S.C. § 484 in 2004. The recently amended visitation rule prevents state regulators and attorneys general from examining national banks, inspecting their records, or prosecuting enforcement actions against them except pursuant to limited exceptions.[2] In 2004, the OCC also expanded the universe of preempted state laws by promulgating the broad preemption rules now found in 12 C.F.R. § 7.4007 (deposit-taking), § 7.4008 (non-real estate lending), § 7.4009 (incidental powers), and § 34.4 (real estate lending) (collectively the "2004 preemption rules").

According to the OCC, 12 U.S.C. § 484 and the 2004 preemption and visitation rules apply to national bank operating subsidiaries to the same extent as to their parent national banks under 12 C.F.R. § 7.4006. 69 Fed.

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[2] 12 C.F.R. § 7.4000. The Second Circuit is currently considering whether the 2004 visitation rule impermissibly expands the definition of "visitorial powers" and unduly restricts Section 484's "courts of justice" exception, issues that have not been briefed before this Court. *See OCC v. Spitzer*, 396 F. Supp. 2d 383, 407 (S.D.N.Y. 2005) (enjoining the New York State Attorney General from enforcing state fair lending laws against national banks or their operating subsidiaries), *appeal docketed*, No. 05-5996cv (2d Cir. 2005).

Reg. 1904, 1913 (Jan. 13, 2004); 69 Fed. Reg. 1895, 1900-01 (Jan. 13, 2004). In reliance on this interpretation, Wachovia Mortgage asserts that Michigan has no right to exercise any oversight under Michigan's mortgage laws because supervision is vested exclusively in the hands of the OCC as to both national banks and the state-chartered companies they control. The court below ruled in favor of respondents, incorrectly giving deference to the OCC's position under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Wachovia Bank v. Watters*, 431 F.3d 556 (6th Cir. 2005).

SUMMARY OF ARGUMENT

At issue in this case is whether the states will be able to protect their citizens from abuses by national bank operating subsidiaries established under the states' own charters. The states are uniquely positioned to implement innovative and rapid responses to abuses. Yet Section 7.4006, together with the 2004 preemption rules, would immunize operating subsidiaries from important state laws, such as mortgage lending laws, depriving consumers of rights and remedies that have no adequate parallel in federal law. Combined with the OCC's 2004 visitation rule, Section 7.4006 would also prevent the fifty states from utilizing their extensive experience and resources to enforce those laws that do apply – leaving all enforcement in the hands of a single federal agency that has shown little interest in ensuring fairness to consumers. No deference is due to an interpretation by a self-interested agency that would undermine consumers' interests and state sovereignty in such a significant way.

Deference to the OCC in this case is also inappropriate because the preemption determination involves pure issues of law properly resolved by the judiciary. The OCC's rules are premised on a number of legal errors, including its failure to follow decisions of this Court that it purported to distill.

The unambiguous language of 12 U.S.C. § 484 – which grants the OCC exclusive visitorial powers only as to "national bank[s]" – precludes deference to the OCC's assertion of exclusive visitorial powers over operating subsidiaries. The OCC's effort to circumvent this statutory language by claiming that state-chartered operating subsidiaries are the equivalent of departments or divisions of their parent banks contradicts basic principles long-settled in the common law. The asserted equivalence is, in any event, irrelevant under this Court's decision in *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986). This Court's precedents also preclude the OCC's attempt to rewrite the specific terms of Section 484 through its interpretation of the "incidental powers" provision, 12 U.S.C. § 24 (Seventh).

Even if the Court were to find an ambiguity in the National Bank Act ("NBA"), the OCC would not be entitled to deference because its position is neither reasonable nor permissible, particularly in light of repeated warnings by Congress that the OCC has exceeded its authority in recent years. Notwithstanding the OCC's contrary suggestion, the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal"), Pub. L. No. 103-328, 108 Stat. 2338 (1994), and the Gramm-Leach-Bliley Financial Modernization Act ("GLBA"), Pub. L. No. 106-102, 113 Stat. 1338 (1999), do not support respondents' argument in this case. In fact, those Acts' legislative

histories reflect Congressional disapproval of overreaching by the OCC.

ARGUMENT

I. THE OCC HAS NO AUTHORITY TO INTERFERE SO SUBSTANTIALLY WITH THE STATES' ABILITY TO PROTECT THEIR CITIZENS.

The combined effect of the OCC's rules is to severely curtail the states' ability to protect their citizens in their dealings with hundreds of state-chartered companies, despite a strong state interest in ensuring fairness in the marketplace. If upheld, the rules would render numerous substantive state laws inapplicable to operating subsidiaries and prevent state officials in many cases from enforcing even those laws that do apply. It is thus unsurprising that Congress did not explicitly delegate to the OCC authority to promulgate these rules. This Court should not find that Congress implicitly did what it did not do explicitly, because powers with such sweeping ramifications for consumers and state sovereignty are not delegated by mere implication. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 159-60 (2000) ("[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.").[3]

[3] Although this brief does not discuss the Tenth Amendment implications of the OCC's rules, *amici curiae* note that this Court has granted certiorari on the question of whether the rules violate the Tenth Amendment by effectively converting a state-chartered corporation into a federal instrumentality in violation of the laws of the state of

(Continued on following page)

A. The States Have a Strong Interest in Protecting Their Citizens in Their Dealings with State-Chartered Operating Subsidiaries.

States have a longstanding, well-recognized interest in protecting their consumers and are often in the best position to respond quickly and appropriately to abusive practices in the marketplace. In comparison to the federal government, states are more familiar, accessible, and accountable to their constituencies and are better positioned to act as laboratories of experimentation in resolving problems in areas as fundamental as home lending.[4]

The extension of the rights of national banks to state-chartered non-banks would impair the states' ability to pursue this important state interest as to a significant number of state corporations with substantial consumer contact. The OCC has identified approximately 500 national bank operating subsidiaries that deal directly with

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its creation. That the OCC's interpretation may raise serious constitutional questions is reason alone to deny deference to the OCC. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-78 (1988); *AFL-CIO v. Fed. Election Comm'n*, 333 F.3d 168, 175, 179 (D.C. Cir. 2003).

[4] *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (stating that federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society" and "allows for more innovation and experimentation in government"); Baher Azmy, *Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation*, 57 Fla. L. Rev. 295, 390-400 (2005); Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 Temple L. Rev. 1, 61-68 (2005).

consumers.[5] Wells Fargo Bank alone has nearly 160 such operating subsidiaries, with a substantial majority apparently involved in mortgage lending. *See supra* note 5. Just one subsidiary of National City Bank of Indiana, First Franklin Financial, originated over $29 billion mortgages in 2005, composing 4.4% of the subprime (higher-cost) market share that year. 1 Inside Mortgage Finance, *The 2006 Mortgage Market Statistical Annual* 187 (2006).

Like national banks, operating subsidiaries are permitted to engage in a wide range of activities beyond mortgage lending – such as acting as a finder for used car sales.[6] Many of these activities lie well outside the OCC's expertise, rendering the states' role in regulating these non-bank entities all the more critical.

B. Upholding Section 7.4006 Would Immunize State-Chartered Operating Subsidiaries from Important Substantive Consumer Protection Laws.

The interplay of Section 7.4006 with other OCC rules threatens to displace vitally important state consumer

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[5] *See* OCC, National Bank Operating Subsidiaries Doing Business with Consumers (Dec. 31, 2005), http://www.occ.treas.gov/consumer/Report%20%202006%20for%20Bank%20pdf.pdf.

[6] *See* OCC, Activities Permissible for a National Bank 2005, at 3, 10-12 (Feb. 2006), http://www.occ.treas.gov/corpapps/BankAct.pdf (listing permissible activities for national banks and their operating subsidiaries, including "Medicare and Medicaid counseling" and finder activities); OCC Corporate Decision 97-60, 1997 WL 402653, *2 (July 1, 1997) (approving an application to expand an operating subsidiary's activities to include acting as a "finder" for used car sales and taking a fee for referring customers to "national auto service companies, such as Firestone, Jiffy Lube and other appropriate parties"); Patricia A. McCoy, *Banking Law Manual* § 5.02 (2d ed. 2003).

protection laws as to entities that are themselves creatures of the states. This preemption sweeps more broadly than the specific supervisory laws at issue in this case, as the OCC has arrogated to itself the right to preempt state consumer protection laws that merely place a "condition" or have more than an incidental effect on any national bank powers recognized by the OCC. *See* 69 Fed. Reg. 1904, 1911-12, 1916-17 (2004); *infra* Section II. While this case frames the respective rights of state and federal officials to oversee these state-chartered entities, it also implicates the rights of aggrieved consumers to petition the courts directly for relief.

A critical example of rights and remedies at stake are those arising under laws enacted by a number of states to curb abusive mortgage lending practices. In response to abuses in the high-cost mortgage market, Congress enacted the Home Ownership and Equity Protection Act of 1994 ("HOEPA"), Pub. L. No. 103-325, Title I, Subt. B, 108 Stat. 2160 (1994) (codified primarily at 15 U.S.C. § 1639). The legislative history of HOEPA makes it clear that the "Conferees intend[ed] to allow states to enact more protective provisions than those in [HOEPA]." H.R. Rep. No. 103-652 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 1977, 1992; *see also* 15 U.S.C. § 1610(b). States and localities are much more likely than the federal government to appreciate the impact of abusive lending practices that are linked to increased mortgage foreclosures,[7] because foreclosures may lead to neighborhood

[7] *See, e.g.*, Azmy, *supra* note 4, at 343-45; Roberto G. Quercia et al., *The Impact of Predatory Loan Terms on Subprime Foreclosures: The Special Case of Prepayment Penalties and Balloon Payments* (2005), http://www.kenan-flagler.unc.edu/assets/documents/foreclosurepaper.pdf; The Reinvestment Fund, *Mortgage Foreclosure Filings in Pennsylvania*

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decline, lowered property values, higher rates of abandonment, higher rates of violent crime, and other costs.[8]

Although HOEPA accomplished many of its objectives, market abuses exploited its weaknesses. To bolster the federal law, states including North Carolina, Georgia, New York, Illinois, and Massachusetts enacted "state HOEPAs" providing greater protections with private rights of action.[9]

At the request of two national banks and their operating subsidiaries, the OCC pronounced the Georgia law preempted in its entirety with respect to national banks and their operating subsidiaries, and on the same day announced its proposed expansive new preemption rules.[10] The OCC has cited its preemption of the Georgia law as an

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75-84 (2005), http://www.trfund.com/resource/downloads/policypubs/Mortgage-Forclosure-Filings.pdf.

[8] Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 Housing Policy Debate 57 (2006); William Apgar et al., *The Municipal Cost of Foreclosures: A Chicago Case Study* 8-12 (2005), http://www.hpfonline.org/PDF/Apgar-Duda_Study_Full_Version.pdf.

[9] *See, e.g.*, N.C. Gen. Stat. §§ 24-1.1A, -1.1E, -2.5, -8, -9, -10.2; Ga. Code Ann. §§ 7-6A-1 to -13; N.Y. Banking Law § 6-*l*; N.Y. Gen. Bus. § 771-a; N.Y. Real Prop. Acts. § 1302; 815 Ill. Comp. Stat. 137/1 to 137/175; Mass. Gen. Laws ch. 183C §§ 1-19.

[10] 68 Fed. Reg. 46,264 (Aug. 5, 2003); 68 Fed. Reg. 46,119 (Aug. 5, 2003). For thoughtful academic criticisms of the OCC's preemption of state anti-predatory lending laws and other consumer protection laws, see generally Azmy, *supra* note 4, at 382-83, 385-88; Nicholas Bagley, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274 (2004); Peterson, *supra* note 4; Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. of Banking & Fin. Law 225 (2004); Vincent Di Lorenzo, *Federalism, Consumer Protection and Preemption: A Case for Heightened Judicial Review* (St. John's Legal Studies Research Paper #09-0026 2005), http://ssrn.com/abstract=796147.

example of how it will apply the 2004 preemption rule standards, *see* 69 Fed. Reg. 1904, 1911-12 nn.57, 59 (2004), suggesting that it will take the position that other "state HOEPAs" are preempted as well.[11] Preemption of these laws is unfair and unwise, as empirical studies have demonstrated that they are effective in reducing predatory lending without reducing consumers' access to legitimate credit.[12] In the predatory lending arena, as in a host of other contexts, Section 7.4006's extension of preemption to state-chartered operating subsidiaries strips borrowers of important rights and remedies under state law that were expressly designed to cure inadequacies in federal law.[13]

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[11] An OCC official testified to Congress that, despite a Congressional request for delay, the OCC proceeded with the final preemption rules due to continuing initiatives from states on anti-predatory lending laws. *Cong. Review of OCC Preemption: Hearing Before the Subcomm. on Oversight & Investigations of the House Fin. Servs. Comm.*, 108th Cong. 30-31 (Jan. 28, 2004) (testimony of Julie Williams, OCC First Senior Deputy Comptroller and Chief Counsel), *available at* http://commdocs.house.gov/committees/bank/hba93717.000/hba93717_0f.htm; *cf.* Bagley, *supra* note 10, at 2284 (noting that rules would preempt all state predatory lending laws).

[12] *See* Roberto G. Quercia et al., *Assessing the Impact of North Carolina's Predatory Lending Law*, 15 Housing Policy Debate 573 (2003); Wei Li & Keith S. Ernst, Center for Responsible Lending, *The Best Value in the Subprime Market: State Predatory Lending Reforms* (2006), http://www.responsiblelending.org/pdfs/rr010-State_Effects-0206.pdf; *cf.* Peterson, *supra* note 4, at 74-76 (discussing spillover effects of preemption rules).

[13] Operating subsidiaries assert that state laws limiting prepayment penalties are preempted pursuant to Section 7.4006. *See, e.g., Nat'l City Bank of Ind. v. Turnbaugh*, 2006 WL 2294843, at *1 (4th Cir. Aug. 10, 2006). The states' interest in curbing abuses regarding prepayment penalties is significant, because prepayment penalties have been linked to an increase in the risk of foreclosure in subprime loans. *See, e.g.*, Quercia et al., *The Impact of Predatory Loan Terms on Subprime Foreclosures*, *supra* note 7; *cf.* H.R. Rep. No. 103-652,

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C. Upholding Section 7.4006 Would Prevent State Officials from Enforcing Even Many Non-Preempted State Laws, Despite the Agency's Own Weak Enforcement Record and Self-Interest.

In addition to preempting substantive state law, Section 7.4006 forecloses any meaningful role for states in overseeing national bank operating subsidiaries. The rule would prevent state officials – including attorneys general – from bringing their resources, experience, and expertise to bear to investigate and enforce a broad swath of consumer law as to these state-chartered entities. *See supra* note 2. It is difficult to overstate the significance of this result, as state officials have been the leaders in enforcing consumer protection laws. According to one 2004 congressional report, state banking agencies and state attorney generals' offices employ nearly 700 full time examiners and attorneys to monitor compliance with consumer laws, more than seventeen times the number of OCC personnel allocated to investigate consumer complaints. Comm. on Fin. Servs., 108th Cong., *Views and Estimates on Matters to Be Set Forth in the Concurrent Res. on the Budget for Fiscal Year 2005*, at 16 (Comm. Print 2004), *available at* http://financialservices.house.gov/media/pdf/FY2005%20Views_Final.pdf, *cited in* Wilmarth, *supra* note 10, at 316 & n.359. "In the area of abusive mortgage lending practices alone, State bank supervisory agencies initiated 20,332 investigations in 2003 in response to consumer complaints, which resulted in 4,035 enforcement actions." *Id.*

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reprinted in 1994 U.S.C.C.A.N. at 1991-92 (indicating that the HOEPA conferees intended that more restrictive state laws relating to prepayment penalties would remain in effect following HOEPA's enactment).

By contrast, the OCC's record of consumer protection enforcement is extremely weak. The agency lists only eight actions in a section on its website captioned "[a]ctions the OCC has taken against banks engaged in abusive practices." OCC, Consumer Protection News: Unfair and Deceptive Practices, http://www.occ.treas.gov/Consumer/Unfair.htm (last visited Aug. 28, 2006). The OCC stayed its hand for *more than a quarter century* before bringing its first action in 2000 to address unfair and deceptive practices under Section 5 of the Federal Trade Commission Act.[14] Even then, the action came only after a decade in which the target bank "had been well known in the . . . industry as the poster child of abusive consumer practices" and after "[a] California state prosecutor . . . embarrassed the OCC into taking action."[15]

Rather than vigilantly and publicly enforcing consumer protection laws, the OCC has in recent years frequently intervened on the side of national banks or their operating subsidiaries against the consumer. *See*

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[14] *See* Julie L. Williams & Michael S. Bylsma, *On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks*, 58 Bus. Law. 1243, 1244, 1246 & n.25, 1253 (2003) (noting that the OCC brought its first such action in 2000, citing authority from the early 1970s indicating that the OCC had the authority to bring such an action under Section 8 of the Federal Deposit Insurance Act, and conceding that "[a]n obvious question is why it took the federal banking agencies more than twenty-five years to reach consensus on their authority to enforce the FTC Act"); *see also* Peterson, *supra* note 4, at 72-73; Wilmarth, *supra* note 10, at 352-56.

[15] Duncan A. MacDonald (former General Counsel, Citigroup Inc.'s Europe and North American card business), Letter to the Editor, *Comptroller Has Duty to Clean Up Card Pricing Mess*, Am. Banker, Nov. 21, 2003, at 17; *see also Frontline: Secret History of the Credit Card* (PBS television broadcast Nov. 23, 2004) (transcript available at http://www.pbs.org/wgbh/pages/frontline/shows/credit/etc/script.html).

Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers*, Wall St. J., Jan. 28, 2002, at A1. For example, it has filed *amicus* briefs on behalf of operating subsidiaries in cases ranging from the State of Minnesota's suit to enforce the Telemarketing Sales Rule, 16 C.F.R. §§ 310.1-.7, to lower state court challenges to state unauthorized practice of law rules that affect document preparation charges.[16]

That the OCC sides with banks rather than consumers when their interests conflict is not wholly surprising given its institutional interests. Depository institutions may choose not only between state and federal regulators, but also among federal regulators, leading to "charter competition" in banking.[17] The OCC has a financial stake in attracting financial institutions to its charter because it is funded by assessments from the banks it regulates, rather than by Congressional appropriations. OCC, Annual Report, Fiscal Year 2005, at 7, *available at* http://www.occ.treas.gov/annrpt/2005AnnualReport.pdf. In 2005, 97% of the OCC's operations were funded by revenues from assessments. *Id.*

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[16] *See, e.g., Minnesota ex rel. Hatch v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995, 997, 999-1001 (D. Minn. 2001) (denying a motion to dismiss and noting that "[t]he OCC's insistence that it must have exclusive jurisdiction over subsidiaries in order to avoid having its authority 'restricted' is not persuasive"); *Charter One Mortgage Co. v. Condra*, 847 N.E.2d 207 (Ind. Ct. App. 2006) (rejecting argument of operating subsidiary and OCC *amicus* that the challenged state law was preempted).

[17] *See, e.g.*, Christine E. Blair & Rose M. Kushmeider, *Challenges to the Dual Banking System: The Funding of Bank Supervision*, 18 FDIC Banking Review 1, 14 (2006); John A. Weinberg, *Competition Among Bank Regulators*, 88 Fed. Res. Bank of Richmond/Econ. Q. 19, 19 (2002).

The OCC has not been shy about using preemption to encourage institutions to adopt its charter. A former comptroller, John D. Hawke, Jr., described the OCC's use of its power to override state laws protecting consumers as "one of the advantages of a national charter," and asserted that he was "not the least bit ashamed to promote it." Bravin & Beckett, *supra*, at A1. This charter competition and funding mechanism create conditions ripe for regulatory capture. *Cf.* Bagley, *supra* note 10, at 2295 (describing "two well-documented institutional pathologies: regulatory capture . . . [and] self-aggrandizing administrators," which "could manifest themselves in particularly pernicious ways if agencies were given an effective carte blanche to override the laws of duly elected state legislatures") (footnotes omitted). Judicial deference is unwarranted in this circumstance, where a self-interested agency has interpreted the scope of its own exclusive jurisdiction in an area of tremendous consequence for the public. *See ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) (per curiam) ("[I]t seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power."); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3rd Cir. 1981) (noting that "an agency ruling that broadens its own jurisdiction is examined carefully" because "government agencies have a tendency to swell, not shrink").

II. NO DEFERENCE IS DUE BECAUSE THE PREEMPTION DETERMINATION INVOLVES PURE ISSUES OF LAW.

Chevron deference is also inappropriate because the preemption issue before the Court involves pure issues of law as to which the agency has no special expertise.

Practical agency expertise is one of the primary justifications for *Chevron* deference. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990). With respect to the interpretation of preemption cases, however, banking regulators have no greater expertise than the courts. As the Tenth Circuit explained in *Colorado Public Utilities Commission v. Harmon*, 951 F.2d 1571 (10th Cir. 1991):

> [C]ourts should defer to the judgment of an administrative agency with reference to topics within the agency area of expertise. . . . However, a preemption determination involves matters of law – an area more within the expertise of the courts than within the expertise of the [administrative agency].

951 F.2d at 1579 (internal quotation marks and citations omitted); *see also Nat'l Mining Ass'n v. Sec'y of Labor*, 153 F.3d 1264, 1267 (11th Cir. 1998) (citing *Harmon*, 951 F.2d at 1579) (citation omitted).

The OCC itself acknowledged the purely legal nature of Section 7.4006 by stating, in promulgating the rule, that it "reflects the conclusion we believe a Federal court would reach, even in the absence of the regulation, pursuant to the Supremacy Clause and applicable Federal judicial precedent." 66 Fed. Reg. 34,784, 34,790 (July 2, 2001). The agency also devoted substantial portions of the 2004 preemption and visitation rules' commentaries to analyzing this Court's prior decisions, a quintessential judicial function. *See* 69 Fed. Reg. 1904, 1910-11 (Jan. 13, 2004); 69 Fed. Reg. 1895, 1899 (Jan. 13, 2004); 68 Fed. Reg. 46,119, 46,121-23 (Aug. 5, 2003); 68 Fed. Reg. 6363, 6368-69 (Feb. 7, 2003).

In promulgating the preemption rules, the agency not only addressed issues of pure law, but resolved those issues incorrectly. One example is the agency's handling of this Court's preemption jurisprudence. In *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), the Court held:

> In defining the pre-emptive scope of statutes and regulations granting a power to national banks, [several of the Court's prior] cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not *prevent or significantly interfere* with the national bank's exercise of its powers.

Id. at 33 (1996) (emphasis added). This has been the law since the 1860's. *See Nat'l Bank v. Commonwealth*, 76 U.S. 353, 362 (1869) ("It is only when the State law *incapacitates* the banks from discharging their duties to the government that it becomes unconstitutional.") (emphasis added). Ignoring these authorities, while purporting to "distill[]" them, the OCC promulgated the 2004 preemption rules, which preempt not only state laws that "incapacitate" or "prevent" or "significantly interfere," but also state laws that merely "*condition*" the exercise of national bank powers. 69 Fed. Reg. at 1910 & n.53, 1916-17 (emphasis added) (citing *Barnett*, 517 U.S. at 34, although the case provides no support for the proposition that state laws that only "condition" the exercise of national bank powers are preempted).

As described in Section III below, the OCC's rules are based on other legal errors, including its erroneous

assumptions that operating subsidiaries are the equivalent of departments or divisions of their parent banks and that the OCC's authority to preempt state authority over operating subsidiaries follows necessarily from the national banks' authority to own them. The Court owes no deference to rules that are premised on analysis of these purely legal issues, which are best resolved by the courts.

III. THE COURT SHOULD NOT DEFER TO THE OCC'S CLAIM OF EXCLUSIVE VISITORIAL POWERS OVER OPERATING SUBSIDIARIES BECAUSE THE STATUTORY LANGUAGE IS CLEAR.

When Congress's intent is clear, no deference is due because the Court must give effect to congressional intent. *Chevron*, 467 U.S. at 842-43. Whether there is an ambiguity is determined by looking at the overall context. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron, 467 U.S. at 843 n.9 (citations omitted). Even when ambiguity is found, it "must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity," and a failure to negate that authority does not supply it. *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468-69 (D.C. Cir. 2005).

In the clearest terms possible, 12 U.S.C. § 484 exempts national banks from state visitorial powers. Seeking to extend this exemption to state-chartered operating subsidiaries, the OCC asserts that operating subsidiaries are "the equivalent of departments or divisions of their parent banks." 66 Fed. Reg. 34,784, 34,788 (July 2, 2001) (discussing proposed new Section 7.4006). This erroneous claim is contradicted by long-settled law, as well as statements by the OCC itself. Even if this claim were true, it would not provide a basis for extending the exemption to non-bank operating subsidiaries, because the plain language of the statute provides the exemption only to "national banks." This conclusion is supported by this Court's decision in *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986), which rejected a similar claim by the Federal Reserve. Because the language of Section 484 is unambiguous, no deference is due to the OCC's assertion of exclusive visitorial powers over operating subsidiaries.

A. Well-Established Common Law Principles Negate the OCC's Claim that Operating Subsidiaries Are the Equivalent of Departments or Divisions of Their Parents.

The OCC's claim that subsidiaries are the equivalent of departments or divisions of their parent banks contradicts basic principles long-settled in the common law. It is fundamental that parent corporations, like all shareholders, are distinct from the corporations they own. *See United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998). This is true even where the parent and the subsidiary have the same officers and directors, have the same name, and are "extremely interrelated." *See, e.g.*, 1 William Meade

Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 25 (perm. ed., rev. vol. 2005). "The corporation is an entity, distinct from its stockholders even if the subsidiary's stock is wholly owned by one person or corporation." *Buechner v. Farbenfabriken Bayer Aktiengesellschaft*, 154 A.2d 684, 686-87 (Del. 1959). This Court has described "this respect for corporate distinctions" as a "bedrock principle" of the common law. *Bestfoods*, 524 U.S. at 62. Because they are distinct entities, a parent company is not liable for the debts of its subsidiaries. This is "a general principle of corporate law deeply 'ingrained in our economic and legal systems.'" *Id.* at 61 (quoting William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporation*, 39 Yale L.J. 193 (1929)).

The OCC invokes the concept of equivalence to permit banks and their subsidiaries to have the best of both worlds: preemption and limited liability. Yet, ironically, characterizing operating subsidiaries as a department or division may, in the right circumstances, help deprive them of the latter. *See, e.g., Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1220-21 (10th Cir. 1997).

This Court has noted that "the failure of [a federal statute] to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that '[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'" *Bestfoods*, 524 U.S. at 63 (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)). Section 484 vests the OCC with exclusive visitorial authority over "national bank[s]," which cannot be read to encompass banks' non-bank operating subsidiaries.

While the judiciary is the arbiter of the unambiguous meaning of "national bank," *Chevron*, 467 U.S. at 843 n.9, it is telling that even the OCC has at times acknowledged the distinction between operating subsidiaries and their parent banks. In interpretive letters permitting shared state oversight of insurance activities in 1983 and 1988, the OCC stated:

> Unlike a national bank, . . . an operating subsidiary is a creature of state corporate laws. It is not in the strict sense a federal instrumentality. Therefore, the Comptroller's Office does not derogate Section 484 by according other authorities the right to examine a national bank's subsidiary if the Office determines that such examinations would be helpful in regulating the activities of the subsidiary.[18]

The OCC's current operating subsidiary preemption rule deserves no deference because its premise contradicts the well-established common law difference between a parent bank and a subsidiary, a distinction recognized in some of the OCC's own letters.

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[18] OCC Interp. Ltr. 277, 1983 WL 54162 (Dec. 21, 1983), *quoted in* OCC Interp. Ltr., 1988 WL 282227 (June 7, 1988) (concluding that "a national bank, absent a compulsory court order, may legally refuse to comply with requests by state officials to inspect the books and records of a national bank's division, but *may not refuse such a request for records of an operating subsidiary*") (emphasis added); *cf.* OCC Interp. Ltr., 1990 WL 362185 n.3 (Oct. 26, 1990) (opining that Ohio laws requiring licensing, examination, and visitation by state authorities for national banks to engage in securities activities are preempted, but expressly taking no position "regarding the authority of the state to enforce any state laws against an operating subsidiary of a national bank").

B. Even If Operating Subsidiaries Were Equivalent to National Banks, *Board of Governors v. Dimension Financial* Precludes the OCC's Extension of Section 484 to Operating Subsidiaries.

The Court's decision in *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986), addressed a situation closely analogous to the OCC's purported application of Section 484 to operating subsidiaries. There, the Federal Reserve Board argued that its authority over "banks" pursuant to the Bank Holding Company Act included the authority to make banking regulations applicable to bank equivalents. While the Court agreed that "there is much to be said for regulating financial institutions that are the functional equivalent of banks," it held that the agency had "no power to correct flaws that it perceives in the statute it is empowered to administer." 474 U.S. at 374.

In *Dimension Financial*, the agency did not directly revise the Act's definition of "bank," but rather interpreted expansively two phrases contained in the statutory definition. *See id.* at 364, 368-69; 49 Fed. Reg. 794, 796-97 (Jan. 5, 1984). The agency argued that in the years subsequent to the enactment of the relevant statutory provisions, the powers of previously unregulated lending institutions had substantially expanded, "making them for all intents and purposes banks" under the statute. 474 U.S. at 367 n.3 (internal quotation marks omitted). According to the agency, the recent proliferation of these institutions threatened the structure established by Congress and necessitated the new regulation. *Id.* at 367. The Court rejected the argument, holding that the statute's plain language controlled. *Id.* at 374. Here, as in *Dimension Financial*, extending

coverage to bank equivalents would be a job for Congress, not the agency.

The OCC's reliance on the "incidental powers" provision in 12 U.S.C. § 24 (Seventh) does not change this result. The court below erred in holding that the general authority of the OCC could be used to broaden the specific grant of exclusive visitorial powers under Section 484. The court concluded that, "'[t]o the extent that using an operating subsidiary is a legitimate power granted to national banks, [Section 484] provides the OCC with ample authority to preempt states from exercising visitorial powers over the subsidiary.'" *Watters*, 431 F.3d at 561 (quoting *Wachovia Bank v. Burke*, 414 F.3d 305, 316 (2d Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3233 (U.S. Sep. 30, 2005) (No. 05-431)). This reasoning should be rejected. When the exercise of a particular agency power is governed by a specific statutory provision, it is that provision, not the agency's general authority, that controls. *See Dimension Fin.*, 474 U.S. at 372 n.6 (holding that a provision authorizing the Board to issue regulations to administer and carry out the Act's purposes did not permit the Board to expand its jurisdiction beyond the boundaries of the specific provisions at issue); *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 659 (1924) ("it is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power"); *cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (noting that Congress "does not . . . hide elephants in mouseholes").

IV. DEFERENCE IS INAPPROPRIATE BECAUSE THE OCC'S READING CANNOT BE SQUARED WITH CONGRESSIONAL DISAPPROVAL OF RECENT OCC OVERREACHING.

Even if the Court were to find that the relevant language of the NBA is ambiguous, deference would be inappropriate under step two of the *Chevron* test, which examines whether the agency's interpretation is a reasonable and permissible construction of the statute. *See Chevron*, 467 U.S. at 843-44. The OCC's position is neither reasonable nor permissible due to all of the flaws described in Sections I through III above. It also cannot be squared with legislative history showing Congressional concern in recent years about OCC overreaching, particularly with respect to preemption and the agency's interpretation of the NBA's "incidental powers" provision.

Although the OCC has relied on Riegle-Neal and GLBA to support its claim of authority, the legislative histories of the two acts and the 1997 amendments to Riegle-Neal demonstrate how unreasonable the agency's current position is. In Riegle-Neal, Congress explicitly stated that, in the interstate branch context, the "host state's" consumer protection, fair lending, and community reinvestment laws apply to any branch in the host state of an out-of-state national bank to the same extent as such laws apply to a branch of a bank chartered by that state, except "when Federal law preempts the application of such State laws to a national bank." Pub. L. No. 103-328, § 102, 108 Stat. 2338, 2350 (1994) (codified at 12 U.S.C. § 36(f)(1)(A)). The conference report makes it clear that Riegle-Neal was *not* intended to undermine the states' role in ensuring consumer protection:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses, and communities. Federal banking agencies . . . play an important role in maintaining the balance of Federal and State law under the dual banking system. *Congress does not intend that [Riegle-Neal] alter this balance and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities.*

H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074 (emphasis added).

The Riegle-Neal conferees also left no ambiguity about the preemption principles that they intended to incorporate – that is, the narrow, traditional preemption principles articulated by this Court that the OCC failed to follow in promulgating its preemption rules, as explained in Section II above. The conference report states:

> Under well-established judicial principles, national banks are subject to State law in many significant respects. . . . Generally, State law applies to national banks unless the State law is in direct conflict with the Federal law, Federal law is so comprehensive as to evidenee Congressional intent to occupy a given field, or the State law stands as an obstacle to the accomplishment of the full purposes and objectives of the Federal law. In this regard, the impact of a State law on the safe and sound operations of a national bank is one factor that may be taken into account in considering whether Federal law preempts State law. *Courts generally use a rule of construction*

> *that avoids finding a conflict between the Federal and State law where possible. The title does not change these judicially established principles.*

Id. (emphasis added).[19]

The conferees also explicitly criticized the OCC for being "inappropriately aggressive" in applying "traditional preemption principles," with the result that state law was being preempted in certain "situations where the federal interest did not warrant that result." *Id.* (citing examples). In light of this concern, Congress imposed exceptional procedural requirements on federal banking agencies, requiring them to publish for comment any new opinion letter or interpretive rule preempting state consumer protection and fair lending laws. 12 U.S.C. § 43. The conference report indicates that these requirements were "not intended to confer upon the agency any new authority to preempt. . . . Rather, [they were] intended . . . to help ensure that an agency only makes a preemption determination when the legal basis is compelling and the Federal policy interest is clear." H.R. Rep. No. 103-651, at 55 (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. at 2076.

In amendments to Riegle-Neal in 1997, Congress added a requirement that the OCC include in its annual report to Congress a review of, and explanation for, each of its preemption determinations. Riegle-Neal Amendments,

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[19] Indeed, Congress gave specific instruction to the OCC as to how and when it could expand the boundaries of the existing standards for displacing state law in a separate exception to the general, default rule that host state consumer protection and fair lending laws apply: when the OCC determines that the law would have a *discriminatory effect* on national bank branches when compared to branches chartered by the host state. 12 U.S.C. § 36(f)(1)(A)(ii).

Pub. L. No. 105-24, § 2, 111 Stat. 238, 239 (1997). Again, a driving force was concern that the OCC had "undertaken preemptive actions which were unnecessarily expansive." 143 Cong. Rec. S5638 (daily ed. June 12, 1997) (statement of Sen. Sarbanes); *see also* 143 Cong. Rec. S5637 (daily ed. June 12, 1997) (statement of Sen. D'Amato). Riegle-Neal and its 1997 amendments thus reflected Congressional dissatisfaction with the OCC's overreaching as of the 1990's and certainly cannot be read as an endorsement of the far more expansive preemption agenda that the OCC revealed through its 2001 and 2004 rules.

There is also no merit to the OCC's argument that Congress, in GLBA, sanctioned the agency's extension of preemption and exclusive jurisdiction by referring to national bank operating subsidiaries as entities that "engage[] solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks."[20] This provision was not intended as a license for the OCC to preempt state law as to operating subsidiaries. Rather, the statutory language was intended to *curb* the OCC, which had authorized operating subsidiaries to engage in activities that Congress had not chosen to permit parent banks to engage in directly. As Representative Bliley explained:

> [O]ne of the most important aspects of the Gramm-Leach-Bliley Act is that it reaffirms a long-standing principle of the Federal Banking law – that a national bank may not own any

[20] Pub. L. No. 106-102, § 121, 113 Stat. 1338, 1378 (1999) (codified at 12 U.S.C. § 24a(g)(3)(A)); *see also* Azmy, *supra* note 4, at 387 (noting that the OCC has attempted to transform a limited grant of authority into complete exemption for operating subsidiaries).

> interest in or control another company engaged in activities that national banks cannot conduct directly unless such ownership or control is expressly authorized by Federal law. . . . Recently, the Comptroller of the Currency has interpreted section 24 (Seventh) of the [NBA] to permit national banks to own and control subsidiaries engaged in activities that national banks cannot conduct directly. These decisions and the legal reasoning therein are erroneous and contrary to the law. The Act overturns these decisions and renders inoperative those portions of Part 5 of the Comptroller's regulations that purport by administrative action to authorize national banks to control subsidiaries engaged in activities that the national banks cannot conduct directly.

145 Cong. Rec. E2386-01, 1999 WL 1032747 (Nov. 4, 1999) (statement of Rep. Bliley).

The legislative histories of the Acts show that Congress believed that the OCC had *already* overstepped its bounds even prior to the agency's expanded displacement of states' supervisory and substantive laws in 2001 and 2004, making any claim that the Acts sanctioned these recent expansions unsustainable.[21]

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[21] Bipartisan concerns about OCC overreaching were also voiced at Congressional hearings on the 2004 rules. *See, e.g., Cong. Review of OCC Preemption: Hearing Before the Subcomm. on Oversight & Investigations of the House Fin. Servs. Comm.*, 108th Cong., at 3 (Jan. 28, 2004) (statement of Chairwoman Sue Kelly), *available at* http://commdocs.house.gov/committees/bank/hba93717.000/hba93717_0f.htm ("[F]or a regulator to single-handedly preempt a State's ability to both determine and enforce laws without public debate or explicit direction from Congress is not only troublesome, but I believe it is careless."); Wilmarth, *supra* note 10, at 297 & n.279.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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IN THE

Supreme Court of the United States

LINDA A. WATTERS, Commissioner,
Michigan Office of Insurance and Financial Services,
Petitioner,

v.

WACHOVIA BANK, N.A., and
WACHOVIA MORTGAGE CORPORATION
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals For The Sixth Circuit

BRIEF FOR AMERICAN BANKERS ASSOCIATION, AMERICA'S COMMUNITY BANKERS, CONSUMER BANKERS ASSOCIATION, CONSUMER MORTGAGE COALITION, FINANCIAL SERVICES ROUNDTABLE, AND MORTGAGE BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are the principal trade associations for the banking industry in the United States. Their members originate the vast majority of the home mortgage loans made in the United States today. Some are national banks with mortgage banking subsidiaries; others are operating subsidiaries of national banks; and still others utilize alternative corporate structures to engage in the mortgage banking business. *Amici* and their members share respondents' interest in a nationwide regulatory environment that provides effective protection for the public without obstruction by state-by-state limitations on the banking operations of national banks, including as conducted through operating subsidiaries.

The American Bankers Association is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty States and the District of Columbia, include financial institutions of all sizes and types, both federally and state-chartered. ABA members hold a majority of the domestic assets of the banking industry in the United States.

America's Community Bankers is the national trade association committed to shaping the future of banking by being the innovative industry leader strengthening the competitive position of community banks. ACB members, whose aggregate assets are more than $1.5 trillion, pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

The Consumer Bankers Association is a nonprofit national trade association founded in 1919 to provide a collective voice for the retail banking industry. Its members com-

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties have consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

prise more than 750 federally insured financial institutions that collectively hold over 70 percent of all consumer credit held by federally insured depository institutions in the United States.

The Consumer Mortgage Coalition is a trade association of national mortgage lenders, mortgage servicers, and mortgage origination-service providers committed to the nationwide rationalization of consumer mortgage laws and regulations.

The Financial Services Roundtable is a national association whose membership represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Its members account for approximately $40.7 trillion in managed assets and $960 billion in revenue, and provide approximately 2.3 million jobs.

The Mortgage Bankers Association is the national association representing the real estate finance industry. The association works to ensure the continued strength of the Nation's residential and commercial real estate markets; to expand homeownership; and to extend access to affordable housing to all Americans. Its membership of over 3,000 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field.

Also appearing as *amici* are 58 bankers associations from each of the fifty States and Puerto Rico. These associations represent the interests of their members (which include state and federally chartered banks, as well as savings and loan associations) at the state and local level. They provide a voice for the industry in state legislatures across the nation, as well as providing support to their members with research and information, public relations, continuing professional education and educational materials, and business development.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the Michigan laws in issue are preempted by the National Bank Act (NBA) and its implementing regulations.

I. Petitioner and her *amici* all but ignore the historical context from which this case arises. But that history is central to the issue petitioner has asked this Court to decide. As the Court has repeatedly recognized, Congress's intent in enacting the NBA was to displace all state laws that would interfere with the exercise of national banks' banking powers.

A. The Court confirmed the supremacy of federal banking laws in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Near the end of the Civil War, Congress established a national banking system that was designed to be wholly independent of state authority. National Bank Act of 1864, ch. 106, 13 Stat. 99. The federal government thereby prohibited the interference of state governments with the exercise of federally authorized banking powers by national banks. In lieu of state regulation, the NBA created the Office of the Comptroller of Currency (OCC), which was vested with exclusive authority to regulate the "business of banking" by national banks.

B. This Court has consistently reaffirmed the broad preemptive reach of the NBA. The statute is designed to protect national banks, in the exercise of their federally authorized banking powers, from the hazard of unfriendly state legislation. *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409 (1874). Accordingly, the States are precluded from regulating the banking operations of national banks. *E.g.*, *Easton* v. *Iowa*, 188 U.S. 220 (1903); *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275 (1896).

As the Court has explained, the "history" of the NBA "is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32 (1996). When Congress confers a power on a na-

tional bank by providing that it "may" engage in certain business, the States are powerless to prevent or put limitations on the exercise of that power by regulating the national bank's business. *Franklin Nat'l Bank* v. *New York*, 347 U.S. 373 (1954). Under the Court's consistent approach to NBA preemption, as summarized in *Barnett Bank*, all state laws that "impair the efficiency" of national banks' exercise of their federally authorized banking powers—*i.e.*, state laws that "interfere with," "encroach upon," or "hamper" the exercise of such powers—are preempted.

II. National banks have the express power to engage in real estate lending, 12 U.S.C. § 371(a), and the incidental power to do so through an operating subsidiary, *id.* § 24(Seventh). The Michigan laws in issue would impair the efficient exercise of both powers, and therefore are preempted.

A. Congress has expressly provided that national banks "may make, arrange, purchase or sell loans" secured by real estate, "subject to . . . such restrictions and requirements as the [OCC] may prescribe by regulation or order." 12 U.S.C. § 371(a). Under *Barnett Bank* and *Franklin*, a congressional declaration that a national bank "may" engage in a line of business precludes state interference with the national bank's exercise of that power.

It is undisputed that the Michigan laws at issue in this case run afoul of the *Barnett Bank* preemption standard with respect to real estate lending conducted by a national bank itself. This is confirmed by an OCC regulation finding that laws like Michigan's would impermissibly "obstruct, impair, or condition" a national bank's exercise of the lending power. 12 C.F.R. § 34.4(a). Petitioner does not challenge that regulation, which is based on the OCC's experience with the impact of state laws on national bank operations and is clearly within the OCC's delegated rulemaking authority. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388 (1987). Thus, the Michigan laws are indisputably preempted from application to a national bank.

B. The NBA authorizes national banks to exercise "incidental" powers, 12 U.S.C. § 24(Seventh), and the OCC has the authority to determine the scope of such powers. *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (*VALIC*). The OCC has long construed the statute to allow national banks to use state-chartered operating subsidiaries to conduct federally authorized banking operations, including real-estate lending. 12 C.F.R. § 5.34. Petitioner does not challenge this regulation, nor does she dispute that a national bank's use of operating subsidiaries is an exercise of the bank's "incidental" powers under the NBA.

Petitioner asserts that the preemptive reach of the NBA extends only to the national bank, and not to its state-chartered operating subsidiaries. This formalistic proposition finds no support in this Court's NBA jurisprudence, which has always focused on whether state law interferes with the *exercise* of federally authorized *powers*, not on the corporate structure of the entity exercising those powers. Thus, in *VALIC*, it was of no moment to the preemption inquiry that the entity selling annuities—an activity that the OCC had determined to be within the "incidental" powers conferred by the NBA—was an operating subsidiary rather than the national bank itself.

Congress has provided that national bank operating subsidiaries may engage "solely in activities that national banks are permitted to engage in directly" and that, as conducted by operating subsidiaries, those activities are "subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. § 24a(g)(3)(A). One of the terms and conditions of real-estate lending by national banks is that it must be unobstructed by state law. 12 C.F.R. § 34.4(a)(1). Because real estate lending through a national bank operating subsidiary is conducted "subject to the same terms and conditions," it necessarily follows that state laws that obstruct such lending cannot be applied to a national bank operating subsidiary, just as they could not apply to the bank itself. Accordingly, the Michigan laws at issue are preempted in this case.

III. Petitioner advances three principal objections to a finding of preemption. Each is meritless.

A. Petitioner first objects to an OCC regulation that states: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R. § 7.4006. Although petitioner and her *amici* expend much ink on the question of whether this regulation is to be afforded "deference," the Court need not address that issue in this case, because preemption of the Michigan laws follows directly from the federal statute itself. The *statute* provides that national bank operating subsidiaries conduct banking activities subject to the same "terms and conditions" as national banks. 12 U.S.C. § 24a(g)(3)(A). Because displacement of obstructive state law is one of the "terms and conditions" of real-estate lending by national banks, the identical displacement occurs when such lending is conducted, as is indisputably authorized, through an operating subsidiary. That is true regardless of the "deference" to be afforded 12 C.F.R. § 7.4006; indeed, the outcome in this case would not change even if the regulation had never been promulgated.

B. Petitioner next contends that 12 U.S.C. § 484, which confers on the OCC exclusive visitorial power over national banks, does not extend to operating subsidiaries. But Section 484 insulates the exercise of national bank banking powers from state visitation, without regard to the corporate form through which such powers are exercised. Moreover, the Court's preemption decisions in other areas make clear that the mere existence of a state charter is no barrier to a finding of federal preemption. *E.g.*, *Texas* v. *United States*, 292 U.S. 522 (1934); *Colorado* v. *United States*, 271 U.S. 153 (1926).

C. Finally, petitioner complains that preemption of the Michigan laws would contravene federalism principles. She is wrong. Contrary to petitioner's contention, there is no "presumption" against preemption where, as here, Congress has legislated in an area since the dawn of the Republic.

United States v. *Locke*, 529 U.S. 89 (2000). Nor does the "clear statement" rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), apply here. As the Court explained in *Barnett Bank*, federal preemption is the rule rather than the exception in the area of national banking; preemption of the Michigan laws thus would not upset the ordinary constitutional balance. For much the same reason, petitioner's assertion that preemption here would offend the Tenth Amendment is baseless. Because Congress has the Commerce Clause authority to regulate national banking, it may displace state laws without transcending any constitutional boundary.

ARGUMENT

The central question in this case is whether a national bank's exercise of federally authorized powers, which would indisputably be immune from state control if conducted in the bank itself, can be subjected to state control simply because the bank elects to exercise those powers through a state-chartered subsidiary corporation. As this Court has repeatedly recognized, the history and structure of the National Bank Act (NBA), 12 U.S.C. § 21 *et seq.*, establish that state laws are preempted if they interfere with the efficient exercise of federally authorized powers. *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32-34 (1996) (citing cases). The power to engage in real estate lending, *and* to do so through an operating subsidiary, is authorized by federal law. It necessarily follows that state interference with the efficient exercise of that power is preempted, as other provisions of the NBA and applicable regulations confirm. Because the Michigan laws in issue (*see* Resp. Br. 7-8 (summarizing laws)) indisputably would interfere with the efficient exercise of the lending power, those laws are preempted as applied to national banks and their operating subsidiaries.

I. The National Bank Act Preempts State Laws That Interfere With The Exercise Of Federally Authorized Powers By National Banks

Petitioner and her *amici* focus almost exclusively on a regulation issued by the Office of the Comptroller of the Currency (OCC) regarding the applicability of state laws to national bank operating subsidiaries. 12 C.F.R. § 7.4006; *see* Part III.A., *infra*. But that regulation does not exist, and cannot be evaluated, in the abstract; rather, it reflects more than a century of legislative and judicial decisions concerning the broad preemptive reach of the NBA. That historical context, which petitioner all but ignores, is essential to answering the question presented by petitioner.

A. Congress Intended To Preclude State Interference With The Exercise Of Banking Powers By National Banks

Following ratification of the Constitution, Congress established a central bank to facilitate government borrowing by approving the charter of the First Bank of the United States (drawn up by Alexander Hamilton) in 1791. Bray Hammond, *Banks & Politics in America: From the Revolution to the Civil War*, 114-18 (1957) (Hammond I). But both the First Bank, whose charter Congress failed to renew in 1811, and the subsequently created Second Bank of the United States, chartered in 1816, were short-lived. Alfred M. Pollard & Joseph P. Daly, *Banking Law in the United States* § 2.03 (2005). The States, backed by agricultural and certain mercantile interests, strongly opposed the Second Bank's power and, to counter it, imposed taxes on the Bank's operations within their jurisdictions. *Id.* at 2-6 to 2-7. It was these taxes, as levied by the State of Maryland, that led to the Court's landmark decision in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

In *McCulloch*, the Court emphatically confirmed the supremacy of federal over state law with respect to national

banking. Starting with the fundamental principle that the powers in the Constitution are derived from the people, the Court held that the Commerce Clause (in conjunction with the Necessary and Proper Clause) of Article I authorized Congress to create a bank. 17 U.S. (4 Wheat.) at 331-33. And, laying the foundation for future federal preemption jurisprudence, the Court held that state law conflicting with federal law is superseded. *Id.* at 405 ("If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action.").

Although *McCulloch* clearly affirmed Congress's right to establish national banks, President Andrew Jackson vetoed the re-chartering of the Second Bank in 1832. Hammond I at 405. That marked the beginning of a period of "free banking," in which the States liberally granted bank charters and allowed state-chartered banks to issue paper currency for use within state lines. *Id.* at 572-73. But state bank note values were uncertain and varied unpredictably, and in the late 1850s, a series of banks defaulted, setting into motion a nationwide crisis both for the currency and for commerce. *Id.* at 707-12.

The outbreak of the Civil War was the catalyst for radical change. As one Senator expressed it: "[S]urrounded by difficulties, surrounded by war, and in the midst of great troubles, [Congress] was compelled to resort to some scheme by which to nationalize and arrange upon a secure and firm basis a national currency." Cong. Globe, 37th Cong., 3d Sess., at 844 (1863) (statement of Sen. Sherman). It became clear, as President Lincoln observed, that there was "no other mode by which 'the great advantages of a safe and uniform currency' could be achieved so promisingly and unobjectionably as by the organization of banking associations under a general act of Congress." Bray Hammond, *Sovereignty and an Empty Purse: Banks and Politics in the Civil War* 290 (1970)

The National Currency Act of 1863, ch. 58, 12 Stat. 665, revised one year later as the National Bank Act of 1864, ch.

106, 13 Stat. 99, was that general act. In debating the legislation, both proponents and opponents of the NBA recognized that it granted the federal government the *exclusive* power to control the national banking system. The NBA would establish a banking system "made to operate directly upon the people independently of State boundaries or State sovereignty," and "wholly independent of State authority." Cong. Globe, 37th Cong., 3d Sess. 1115 (1863) (statement of Rep. Spaulding). As one opponent stated, "the whole purpose and object and scope and tendency of the bill is to prostrate State power and put it at the control of the great centralized power to be established here." Cong. Globe, 38th Cong., 1st Sess. 1413 (1864) (statement of Rep. Mallory). In defense of that purpose, a supporter stated:

> The proposition, as I understand it, is to make this a great national system, to make it responsible to the national Government, to make it subject to any burdens and restrictions the national Government may see fit to place upon it; and to carry out that object it will not do to place it in the power of the States, otherwise you place it in the power of any State which may be opposed to the system to cripple and destroy it.

Id. at 1393 (statement of Rep. Washburn).

Congress was keenly aware of *McCulloch* v. *Maryland* in declaring the preemptive effect of the NBA. As one Senator reminded his colleagues, the Court had explained that "'it is of the very essence of supremacy to remove all obstacles to its action within its own sphere,'" and accordingly, a bank created by the federal government "must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under that Government from which it derives its functions." Cong. Globe, 38th Cong., 1st Sess. 1893 (1864) (statement of Sen. Sumner) (quoting *McCulloch*, 17 U.S. (4. Wheat) at 427). Thus, "I shall vote to keep [the new national banking system] free from all State hostility or even State rivalry, that it may become in reality as in name, national in all respects." *Id.* at 2130.

Ultimately, Congress embraced the NBA's objectives, and voted "to take from the States . . . all authority whatsoever over . . . [national] banks, and to vest that authority here in Washington, in the . . . Secretary of the Treasury." Cong. Globe, 38th Cong., 1st Sess. 1267 (1864) (statement of Rep. Brooks). The NBA codified federal control over the money supply, taxation, and interest rate regulation, prohibiting the States to exert their interests in those areas. National Bank Act, ch. 106 of 1864, §§ 19-23, 31 (currency), 30 (interest rates), 41 (taxation), 13 Stat. at 105-106, 108-109, 111-112. *See* Cong. Globe, 38th Cong., 1st Sess. 1376 (interest rate regulation), 1377 (control of national currency) (1864). The federal government thereby "assumed entire control of the currency of the country, and, to a very considerable extent, of its banking interests, prohibiting the interference of State governments." S. Misc. Doc. 100, 39th Cong., 1st Sess. (1866).

Within the Department of the Treasury, the NBA established the Comptroller of the Currency, in whom Congress vested plenary authority to charter, examine, supervise, regulate and bring enforcement actions against national banks. That authority was exclusive of any State "visitorial" power over national banks. § 54, 13 Stat. at 116 (codified as amended at 12 U.S.C. § 484).[2] Congress confirmed the exclusive nature of the OCC's visitorial authority over national banks in 1982. Responding to a state court decision concerning the enforcement of state escheat laws, *see Minnesota* v. *First Nat'l Bank of St. Paul*, 313 N.W.2d 390 (Minn. 1981), Congress amended the NBA both to correct that court's erro-

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[2] In its original version, the "visitorial powers" provision of the NBA stated: "[A national bank] shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery." § 54, 13 Stat. at 116. The reference to "this act" was subsequently codified as "this Title," 1878 R.S. 5421, and later was changed to "law." *See* Federal Reserve Act, ch. 6, § 21, 38 Stat. 251, 272 (1913) (also substituting the reference to "courts of law and chancery" with "courts of justice").

neous conclusion that state law could serve as authority for state examinations of national banks, *see* Pub. L. No. 97-320, § 412, 96 Stat. 1469, 1521 (1982) (replacing 12 U.S.C. § 484's reference to permissible non-OCC visitations "authorized by law" to "authorized by Federal law"), and to carve out an extremely narrow exception to the OCC's exclusive visitorial authority for certain state examinations of national banks based on evidence of noncompliance with state escheat law. *See* 12 U.S.C. § 484(b); § 412, 96 Stat. at 1521. Such an exception would not have been necessary had the statute not otherwise so completely prohibited the states from exerting "visitorial" authority over of national banks. *See* Br. for National City Bank at Part I.

B. This Court Has Consistently Interpreted The NBA To Preempt State Laws That Interfere With The Exercise Of Banking Powers By National Banks

Since the NBA's enactment, the Court has repeatedly confirmed the statute's broad preemptive effect. In one of its earliest interpretations of the NBA, the Court described the statute as specifically designed to protect national banks' exercise of federally authorized powers from "the hazard of unfriendly legislation by the States." *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1874). Thus, insofar as the banking powers of national banks are concerned, "the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Farmers' & Mechs.' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875). Consistent with its opinion in *McCulloch* v. *Maryland*, the Court subsequently explained:

> National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that *an attempt by a state to define their duties or control the conduct of their affairs is absolutely void*, wherever such attempted exer-

> cise of authority expressly conflicts with the laws of the United States, and either *frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created.*

Davis v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896) (emphases added); *see also Talbott* v. *Bd. of County Comm'rs*, 139 U.S. 438, 443 (1891) ("The[ ] various provisions, scattered through the entire body of the statute respecting national banks, emphasize . . . an intent to create a national banking system co-extensive with the territorial limits of the United States, and with uniform operation within those limits"); *Easton* v. *Iowa*, 188 U.S. 220, 231 (1903) (the NBA "provide[s] a symmetrical and complete scheme for the banks to be organized under the provisions of the statute").

Echoing Congress's own statements regarding the uniform nature of the system established by the NBA, the Court has emphasized that national banks must be held "independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." *Easton*, 188 U.S. at 229. And, because "the State has no power to enact legislation contravening the Federal laws for the control of national banks," *Guthrie* v. *Harkness*, 199 U.S. 148, 152 (1905), "[h]owever wise or needful [a state's] policy, . . . it must give way to [any] contrary federal policy" underlying the NBA. *Franklin Nat'l Bank* v. *New York*, 347 U.S. 373, 378-79 (1954); *see also Marquette Nat'l Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 308, 314-15 (1978) ("Close examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that . . . Congress intended to facilitate . . . a 'national banking system'") (citation omitted).

Central to the Court's NBA preemption jurisprudence is the understanding that the States may not interfere with the

efficient exercise of the banking *powers* of national banks. As the Court has explained:

> In using the word "powers," the [NBA] chooses a legal concept that, in the context of national bank legislation, has a history. That history is one of interpreting grants of both enumerated and incidental "*powers*" to national banks as grants of authority not normally limited by, but rather *ordinarily pre-empting*, contrary state law.

Barnett Bank, 517 U.S. at 32 (emphasis added); *see also id.* at 33 ("In defining the pre-emptive scope of statutes and regulations granting a power to national banks," the Court in prior cases had recognized that "normally Congress would not want States to forbid, or impair significantly, the exercise of a power that Congress explicitly granted").[3]

In *Barnett Bank*, the Court relied particularly on its 1954 decision in *Franklin*, which emphatically underscores the breadth of a national bank's authority to exercise its banking powers free from *any* state limitation or condition. The question in *Franklin* was whether the NBA preempted a New York State statute that forbade banks to use the words "saving" and "savings" in advertising. 347 U.S. at 374. The New York statute did not prohibit banks from taking deposits—*i.e.*, exercising savings-related banking powers—but rather *conditioned the exercise of those powers* on a limitation on the right to advertise regarding bank deposit accounts. The Court, while recognizing that the New York statute prevented only the *specific* power to use the word "savings" in advertising, emphasized that preemption derived from the effect of the

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[3] As explained in Part II.B. *infra*, the exercise of express powers through an operating subsidiary is one of the "incidental powers" of a national bank under the NBA. Because *Barnett Bank* and the long line of precedent on which it was based make clear that state laws interfering with all such "powers" are preempted, petitioner's contention that exclusive federal regulation of the banking activities of national bank operating subsidiaries would constitute "a sharp break from the past" (Pet. Br. 26) is historically inaccurate.

state restriction upon the *underlying* national bank power to offer savings accounts. Observing that "[m]odern competition for business finds advertising one of the most usual and useful of weapons," the Court found that "[i]t would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it." *Id.* at 377-78. As there was "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances," the advertising restriction was preempted—not because it "prevented" a certain form of marketing activity, but rather because it *burdened the exercise of the power* to offer savings accounts. *Id.* at 378-79.

The history and structure of the NBA thus teach that the federal statute displaces all state laws that "impair [the] efficiency" of national banks' *exercise of their federally authorized powers*, both express and incidental. *Barnett Bank*, 517 U.S. at 34. Accordingly, if a state law would "interfere with," "encroac[h]" upon, or "hampe[r]" the exercise of a power authorized under the NBA, it is preempted. *Id.* at 33-34. In contrast, the NBA does not preempt state laws that do not unduly burden a national bank's "exercise of its powers." *Ibid.* (offering examples of non-preempted laws).[4] The question before the Court is into which category the Michigan laws at issue fall. As explained next, the Michigan laws, just like the New York law in *Franklin*, clearly interfere with the efficient exercise of a national bank's banking powers. Just as New York's restrictions on advertising interfered with national banks' use of "one of the[ir] most usual and useful of weapons" to conduct banking, *Franklin*, 347 U.S. at 377, so too do

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[4] *See also* 12 C.F.R. § 34.4(b) ("State laws on [certain enumerated] subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks [and thus their operating subsidiaries] to the extent that they only incidentally affect the exercise of national banks' real estate lending powers.").

Michigan's restrictions on the use of operating subsidiaries interfere with national banks' use of the most usual and useful means through which to conduct real estate lending. *See* Br. for Clearing House Association at Part II. The Michigan laws at issue are, therefore, preempted.

II. The National Bank Act Preempts State Laws That Interfere With A National Bank's Exercise Of The Power To Engage In Real Estate Lending Through An Operating Subsidiary

The history of the NBA, and this Court's consistent recognition of its broad preemptive scope, establish that state laws are preempted if they interfere with the efficient exercise of a federally authorized power—express or incidental—by a national bank. *Barnett Bank*, 517 U.S. at 32-33. The Michigan laws at issue here would interfere with a national bank's express power to engage in real-estate lending, 12 U.S.C. § 371(a), as well as the bank's incidental power to exercise the lending power through an operating subsidiary, id. § 24(Seventh); 12 C.F.R. § 5.34. Accordingly, the Michigan laws are preempted by the NBA.

A. The Power To Engage In Real Estate Lending Is Expressly Conferred By The NBA

Congress has provided that "[a]ny national banking association may make, arrange, purchase or sell loans . . . secured by liens on interests in real estate, subject to section 1828(*o*) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371(a).[5] A statutory provision that a national bank "may" engage in specified activity is "declaratory of the right of a national bank to enter into or remain in that

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[5] 12 U.S.C. § 1828(*o*) requires the federal banking regulators to adopt uniform regulations governing real-estate lending.

type of business," *Franklin*, 347 U.S. at 377, and preempts contrary state law. Where (as here) a federal statute "contains no 'indication' that Congress intended to subject [a federally granted] power to local restriction," this Court applies "a broad interpretation of the word 'may' that does not condition federal permission upon that of the State." *Barnett Bank*, 517 U.S. at 34-35. Thus, state laws, such as the Michigan statutes at issue here, that place "restrictions" or "conditions" on the exercise of national bank real estate lending powers are preempted. *See id.* at 32-33 (provision that national banks "may . . . act as the agent" for insurance sales preempts contrary state law); *Franklin*, 347 U.S. at 375-79 (provision that national banks "may . . . receive . . . savings deposits" preempts contrary state law).

That laws like Michigan's run afoul of the *Barnett Bank* standard has been confirmed by the federal agency charged with regulating national banks. In 2003, the OCC proposed a regulation to "clarify[] the applicability of state law to national banks" by "identify[ing] types of state laws that are preempted, as well as types of state laws that generally are not preempted, in the context of national bank lending . . . activities." Bank Activities & Operations, Real Estate Lending and Appraisals, 68 Fed. Reg. 46,119, 46,119 (Aug. 5, 2003). After surveying the history of legislation and judicial decisions involving national banks, the Comptroller listed several categories of state laws that had been found preempted, including "[s]tate statutes that require national banks to obtain a license or to register with the state." *Id.* at 46,123 & n.41 (citing cases and administrative interpretations).

The OCC explained that 12 U.S.C. § 371 "provides a broad grant of authority to national banks to engage in real estate lending," and "does not condition [that] grant upon engaging in that activity only to the extent that a state permits it." 68 Fed. Reg. at 46,124. Rather, "section 371 refers expressly and exclusively to the OCC as the entity possessing authority to set *restrictions* and *requirements* that apply to national banks' real estate lending activities," which have "been extensively regulated at the *Federal* level since the

[lending] power first was codified." *Ibid.* (emphases added). The Comptroller concluded that "[u]nder 12 U.S.C. 371, the OCC has the . . . specific authority to provide that the specified types of laws relating to national banks' real estate lending activities are preempted." Bank Activities & Operations, Real Estate Lending and Appraisals, 69 Fed. Reg. 1,904, 1,909 (Jan. 13, 2004).

The OCC's clarifying regulation, as codified in 2004, provides that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks." 12 C.F.R. § 34.4(a). The "obstruct, impair, or condition" standard is "the distillation of the various preemption constructs articulated by the Supreme Court" in *Barnett Bank* and other cases and is not intended "as a replacement construct that is in any way inconsistent with those standards." 69 Fed. Reg. at 1,910. Under that standard, several categories of state laws are clearly preempted, including state "[l]icensing" and "registration" requirements for mortgage lenders. 12 C.F.R. § 34.4(a)(1).[6]

Petitioner does not challenge this OCC regulation, and for good reason. The OCC clearly has the authority to determine the types of state laws that interfere with the exercise of banking powers. *See Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987) ("The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle [of giving 'great

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[6] *See* 12 C.F.R. § 34.4(a)(1)-(14) (listing categories of preempted state laws). "This list . . . reflects [the OCC's] experience with types of state laws that can materially affect and confine—and thus are inconsistent with—the exercise of national banks' real estate lending powers." 69 Fed. Reg. at 1,911. The regulation also lists several categories of state laws that "do not attempt to regulate the manner or content of national banks' real estate lending, but that instead form the legal infrastructure that makes it practicable to exercise a permissible Federal power." 69 Fed. Reg. at 1,912; *see* 12 C.F.R. § 34.4(b)(1)-(9).

weight' to agency determinations] with respect to his deliberative conclusions as to the meaning of these laws."); *cf. Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) ("The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements"). Thus, as applied to real-estate lending activities by a national bank itself, it is undisputed that the Michigan laws at issue are preempted.

B. NBA Preemption Extends To The Exercise Of Incidental Powers, Including the Power To Lend Through An Operating Subsidiary

Petitioner concedes that, as an exercise of the "incidental" powers conferred by 12 U.S.C. § 24(Seventh), national banks may use operating subsidiaries to conduct federally authorized banking activities, including real estate lending. Pet. Br. 21 ("no one disputes that 12 USC § 24 (Seventh) authorizes national banks to use nonbank operating subsidiaries"). That concession is necessary because the OCC has long construed the NBA to authorize national banks to use operating subsidiaries (*see* Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,459 (Aug. 31, 1966)), and this Court has recognized the broad discretion enjoyed by the OCC in defining incidental powers. *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-58 & n.2 (1995) (*VALIC*). But while agreeing that a national bank may use operating subsidiaries to engage in real estate lending, and not disputing that the NBA preempts state laws obstructing or conditioning such lending (including the Michigan laws at issue here) as applied to national banks, petitioner argues that such state laws nevertheless survive preemption with respect to national bank operating subsidiaries, as those subsidiaries are separate corporate entities chartered under state law. Pet. Br. 17-20.

This formalistic proposition is flatly at odds with this Court's NBA preemption jurisprudence, which has always

focused on the exercise of national banks' banking *powers*, not the *corporate structure* of a national bank. Because, as the Court has properly recognized, the NBA was intended to preclude state interference with the *exercise of those powers*, it would thwart Congress' objectives to allow states to exert their regulatory influence whenever a national bank chooses to make use of an operating subsidiary for purposes of exercising its powers. In *VALIC*, for example, this Court addressed the question whether the OCC reasonably had concluded, in granting the application for a national bank's operating subsidiary to act as an agent in the sale of annuities, that annuity sales were "the business of banking" within the meaning of Section 24(Seventh). *See* 513 U.S. at 255-56. Although the Court recognized that the approval provided by the OCC was for annuity sales by the operating subsidiary rather than the bank itself, it analyzed the question presented by direct reference to *national bank* powers—there was no need to distinguish between the exercise of those powers through the operating subsidiary as opposed to by the bank itself. *See id.* at 256-61.

Nonetheless, petitioner argues that, because operating subsidiaries are "affiliates" of national banks, and because Congress has treated national banks and their "affiliates" differently in certain contexts, preemption of state law applies only to national banks and not their "affiliates"—including an operating subsidiary. Pet. Br. 21-22. This argument ignores, however, the fact that courts have consistently treated operating subsidiaries as equivalent to national banks with respect to *powers* exercised under federal law (except where federal law provides otherwise). The use of an operating subsidiary is itself an exercise of a national bank's incidental powers, and state laws that interfere with the exercise of national banks' incidental powers are preempted no less than laws that interfere with national banks' expressly enumerated powers. *Barnett Bank*, 517 U.S. at 32 ("*both* enumerated *and* incidental 'powers' . . . ordinarily pre-empt[] contrary state law") (emphases added). Thus, as this Court understood in *VALIC*, a distinction between a national bank and its operating subsidi-

ary is not relevant to federal preemption of state laws that interfere with the exercise of national bank powers. *See VALIC*, 513 at 255-56; *see also Clarke*, 479 U.S. 388 (securities brokerage subsidiary); *Am. Ins. Ass'n* v. *Clarke*, 865 F.2d 278 (D.C. Cir. 1988) (bond insurance subsidiary); *M & M Leasing Corp.* v. *Seattle First Nat'l Bank*, 563 F.2d 1377 (9th Cir. 1977) (auto leasing subsidiary).

Petitioner's argument about "affiliates" also ignores Congress's express distinction between national bank operating subsidiaries and other subsidiary "affiliates" of national banks. In the Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, § 121(a)(2), 113 Stat. 1338, 1373-80 (1999) (GLBA), Congress distinguished national bank operating subsidiaries from "financial subsidiaries" of national banks, identifying an operating subsidiary of a national bank as a subsidiary that "engages *solely in activities that national banks are permitted to engage in directly* and are conducted *subject to the same terms and conditions* that govern the conduct of such activities by national banks." 12 U.S.C. § 24a(g)(3)(A) (emphases added).[7] In response to GLBA, the OCC revised its regulations to mirror the statute, specifying that "[a] national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly," and that "[a]n operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. § 5.34(e)(1), (3); Financial Subsidiaries & Operating Subsidi-

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[7] A Senate committee specifically noted in this context that, "[f]or at least 30 years, national banks have been authorized to invest in operating subsidiaries that are engaged only in activities that national banks may engage in directly. For example, national banks are authorized directly to make mortgage loans and engage in related mortgage banking activities. Many banks choose to conduct these activities through subsidiary corporations. Nothing in this legislation is intended to affect the authority of national banks to engage in bank permissible activities through subsidiary corporations. . . ." S. Rep. No. 44, 106th Cong., 1st Sess. 8 (1999).

aries, 65 Fed. Reg. 12,905, 12,911 (Mar. 10, 2000). The "same terms and conditions" proviso of GLBA and its implementing regulation, which petitioner does not challenge, is fatal to her case.

One of the specific "terms and conditions" that governs real-estate lending by a national bank is that the bank is not subject to state registration laws. 12 C.F.R. § 34.4(a)(1). Because real-estate lending through an operating subsidiary is governed by those "same terms and conditions," a national bank operating subsidiary also cannot be subjected to state registration laws. It follows inexorably from the text of 12 U.S.C. § 24a(g)(3) that neither state registration requirements nor any other state laws that "interfere with," "encroach[]" upon, or "hamper[]" any aspect of real estate lending may be applied to national bank operating subsidiaries, as such application would directly obstruct the exercise by a national bank of its real estate lending powers through an operating subsidiary. *Barnett Bank*, 517 U.S. at 33-34. Pursuant to 12 U.S.C. § 24a(g)(3), operating subsidiaries of national banks are treated just like the banks themselves with respect to the terms and conditions of their real estate lending, including with respect to preemption of state laws purporting to govern any aspect of such lending. Thus, the Michigan laws at issue in this case can no more be applied to operating subsidiaries of national banks than they could be to the banks themselves. They are preempted by the NBA.

III. Petitioner's Attempts To Avoid Preemption Are Meritless

The previous discussion establishes that the Michigan laws at issue are preempted from application to either national banks or their operating subsidiaries by statutes (12 U.S.C. §§ 24(Seventh) & 371) and regulations (12 C.F.R. §§ 5.34 & 34.4) the validity and applicability of which petitioner does not even purport to challenge in this case. The judgment below could be affirmed on that basis alone. Moreover, the objections that petitioner and her *amici* do raise—*viz.*, that 12 C.F.R. § 7.4006 is not entitled to deference; that 12 U.S.C.

§ 484 does not apply to operating subsidiaries; and that a preemption finding would raise federalism concerns—do not alter the conclusion that the Michigan law is preempted by the NBA.

A. Petitioner's Challenge To 12 C.F.R. § 7.4006 Is Misguided

Petitioner trains most of her fire on the OCC regulation that states: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R. § 7.4006. Petitioner and her *amici* argue at length that this regulation does not merit "deference" by the courts. Pet. Br. i, 28-38. But there is no need here to address that issue, because preemption of the laws Michigan seeks to apply flows from the NBA itself, and does not depend on Section 7.4006. Thus, regardless of the deference due to Section 7.4006, federal law precludes Michigan from applying its mortgage lending registration and related requirements to a national bank or its operating subsidiary.

Section 7.4006 was designed to "clarif[y] that state laws apply to a national bank operating subsidiary to the same extent as those laws apply to the parent national bank." Investment Securities; Bank Activities & Operations; Leasing, 66 Fed. Reg. 8,178, 8,181 (Jan. 30, 2001). The OCC expressly based Section 7.4006 on the provisions of GLBA and 12 C.F.R. § 5.34(e)(3) that operating subsidiaries conduct banking activities on the "same terms and conditions" as national banks. As the OCC stated: "A fundamental component of these descriptions of the characteristics of operating subsidiaries in GLBA and the OCC's rule is that state laws apply to operating subsidiaries to the same extent as they apply to the parent national bank." Investment Securities: Bank Activities & Operations; Leasing, 66 Fed. Reg. 34,784, 34,788 (July 2, 2001). Thus, "unless otherwise provided by Federal law or OCC regulation, State laws, such as licensing requirements, are applicable to a national bank operating subsidiary only to the extent that they are applicable to national banks." *Ibid.*

Petitioner's challenge to Section 7.4006 ignores the significance of this regulatory history, and in particular the OCC's adherence to the "same terms and conditions" provision in the GLBA definition of an operating subsidiary. Although petitioner attempts to portray Section 7.4006 as a "preemptive regulation," the preemption described in Section 7.4006 flows directly from the NBA itself. Under GLBA, the same terms and conditions apply to operating subsidiary lending and national bank lending. 12 U.S.C. § 24a(g)(3). The necessary consequence of that congressional directive is that, because displacement of contrary state law is one of the "terms and conditions" of national bank lending, the identical displacement occurs when the lending power is exercised through an operating subsidiary. Because Section 7.4006 simply recites that result, the level of deference due to the regulation is not an issue this Court needs to address. Indeed, the proper outcome in this case—preemption of Michigan's registration law—would not change even if 12 C.F.R. § 7.4006 had never been promulgated.

B. Petitioner's Reading Of 12 U.S.C. § 484 Is Incorrect

Both petitioner and her *amici* devote considerable space to arguing that, because 12 U.S.C. § 484 does not expressly refer to "operating subsidiaries," Congress must not have intended to preclude the states from exercising "visitorial" authority over such subsidiaries. *See* Pet. Br. 17-22. There is simply no basis for that contention.

Section 484 was enacted a full century before national bank operating subsidiaries existed. After the OCC authorized the use of operating subsidiaries in 1966, there was no need to amend the statute, because it already precluded any state visitation that would restrict or otherwise affect the *exercise of a national bank's banking powers*—in any form or any manner. *Cf. First Nat'l Bank of Youngstown v. Hughes*, 6 F. 737, 740-41 (C.C.N.D. Ohio 1881) (a "visitation" of a national bank does not occur when state taxation authorities seek bank records in aid of taxation of depositors, which does

"not contemplate inspection, supervision, or regulation of [the bank's] *business*") (emphasis added). Whether those powers are exercised by a national bank directly or through an operating subsidiary, the same Congressional objective for precluding state visitations applies. It is the *exercise of banking powers* of national banks that Congress sought to insulate from "visitations" by the states; accordingly, Section 484 cannot be read to permit state visitations of operating subsidiaries *with respect to their activities conducted as an exercise of national bank powers*. Congress did not need to distinguish between national banks and their operating subsidiaries to ensure the applicability of Section 484.

Contrary to petitioner's suggestion (Pet. Br. 20), it is immaterial that national bank operating subsidiaries are incorporated under state law. State incorporation laws ordinarily do not regulate the *substantive activities* of the corporations established thereunder—they merely dictate the ministerial means of establishing and maintaining the corporate form.[8] The NBA, in contrast, regulates the *banking activities* in which a national bank is authorized to engage. Because the NBA and the OCC's implementing regulations comprehensively govern those activities, whether undertaken by the bank itself or an operating subsidiary (*see* 12 C.F.R. § 5.34), there is a conflict between federal law and the application of state laws such as the Michigan statutes at issue to *either* national banks or their state-incorporated operating subsidiaries.

The decisions of this Court in other preemption cases make clear that where there is a basis for federal preemption, it is irrelevant that the conduct at issue may be performed

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[8] *See, e.g.*, Del. Code Ann. tit. 8, §§ 101-111 (providing corporate formation requirements in connection with certificate of incorporation contents, Secretary of State filings, commencement of corporate existence, incorporator powers and meetings, bylaws, and the interpretation and enforcement of the certificate of incorporation and bylaws); N.Y. Bus. Corp. Law §§ 401-409 (similar); 805 Ill. Comp. Stat. 5/2.05 to 5/2.35 (similar); N.C. Gen. Stat. §§ 55-2-01 to 55-2-07 (similar).

through a state-chartered corporation. *See, e.g., Texas* v. *United States*, 292 U.S. 522, 531-32, 535 (1934) ("[W]hile railroad corporations [are] left under state charters, they [are] still instrumentalities of interstate commerce, and, as such, [are] subject[] to the paramount federal obligation to render the efficient and economical service required in the maintenance of an adequate system of interstate transportation"); *Colorado* v. *United States*, 271 U.S. 153, 161-62, 165-66 (1926) (noting that while "[t]he charter of the Colorado & Southern is a contract with the state," "[t]he obligation assumed by the corporation under its charter of providing intrastate service . . . within the state is subordinate to the performance by it of its federal duty, also assumed, efficiently to render transportation services in interstate commerce").[9] Indeed, petitioner and her *amici* have not cited a single case in which this Court's preemption analysis even mentioned, let alone was guided by, the jurisdiction in which the entity complaining of state regulation was incorporated. Petitioner's theory in this case would thus work a radical revision of the Court's Supremacy Clause jurisprudence.

C. The Federalism Concerns Invoked by Petitioner Are Inapplicable

In a series of interrelated arguments, petitioner and her *amici* contend that principles of federalism should lead the Court to conclude that the NBA does not preempt state laws that purport to regulate the mortgage lending operations of national bank operating subsidiaries. *See* Pet. Br. 22-28, 39-44. A variant of this contention was rejected almost 200 years

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[9] Of course, federal law preempts state laws that otherwise would apply to the activities of state-chartered corporations in any number of circumstances. *See, e.g., Geier*, 529 U.S. 861 (state law cannot require state-chartered automobile manufacturer to install air bags); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (state law cannot regulate pollution by state-chartered paper company); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (enjoining Texas' enforcement of its deceptive advertising law against an airline incorporated under state law).

ago in *McCulloch* v. *Maryland*; as reformulated here, it fares no better today.

Petitioner first argues that, for purposes of the preemption inquiry here, "'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Pet. Br. 23 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). But as the Court has since explained, "an 'assumption' of nonpre-emption is *not* triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000) (emphasis added). In particular, where "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme," "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Ibid.* As discussed above, Congress chartered the first Bank of the United States just two years after ratification of our Constitution, and an extensive federal statutory and regulatory scheme has governed the national bank system since the Civil War. Neither petitioner nor any of her *amici* has been able to cite even a single decision in which this Court has applied the *Rice* "assumption" to a preemption inquiry under the NBA. That is because preemption is the rule, not the exception, in such cases. *Barnett Bank*, 517 U.S. at 32.

Petitioner next invokes the "clear statement" rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). Pet. Br. 26-27. As the Court found in *Gregory*, the state constitutional provision at issue defined the qualifications of judges, and thus embodied "a decision of the most fundamental sort for a sovereign entity." 501 U.S. at 460. *Gregory* is inapplicable here because the authority Michigan seeks to exert is an ordinary incident of regulation, not "a decision of the most fundamental sort for a sovereign entity." *Ibid.* Congressional displacement of the Michigan statutes at issue would not upset the usual balance; to the contrary, it would be consistent with the exclusive federal regulation of national bank powers since the

Civil War. *See, e.g., Easton*, 188 U.S. at 230 ("Such being the nature of these national institutions [banks], it must be obvious that their operations cannot be limited or controlled by state legislation . . ."). In any event, the Court has held for more than a century that the banking laws clearly oust inconsistent state laws; no more is required.

Petitioner further argues that preemption of state law in these circumstances exceeds the powers conferred on Congress by the Constitution, and thus offends the Tenth Amendment's reservation of power to the States. *See* Pet. Br. 39. Although Petitioner concedes that "Congress has general power . . . to preempt State laws that affect national banks," she maintains that this concession "does not end the Tenth Amendment inquiry." *Ibid.* But petitioner is wrong. "As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States" without violating the Tenth Amendment, including by "legislat[ing] in areas traditionally regulated by the States." *Gregory*, 501 U.S. at 460. It has long been settled that Congress acts within its powers in creating and regulating national banks, including by ensuring that national banks' banking powers are not affected by state law. *See, e.g., Farmers' & Mechs.' Nat'l Bank*, 91 U.S. at 33-34. Because the Michigan laws at issue here would impede the exercise of banking powers that Congress clearly had authority to confer, NBA preemption of those laws transcends no Constitutional boundary.

Petitioner's reliance in this context on *New York* v. *United States*, 505 U.S. 144, 188 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997), is misplaced. *See* Pet. Br. 38-40. Those cases hold that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 925. But while the government may not "compel[] States to regulate," state regulation "can always be pre-empted under the Supremacy Clause if it is contrary to the national view." *New York*, 505 U.S. at 168; *see also id.* at 167. This case is about preemption, not compulsion. The Tenth Amendment

stands as no barrier to preemption where, as here, Congress has acted pursuant to its Article I powers.

Petitioner's attempt to analogize this case to *Hopkins Federal Savings & Loan Ass'n* v. *Cleary*, 296 U.S. 315 (1935), is similarly misguided. *See* Pet. Br. 41-42. *Hopkins* stands only for the proposition that where a state charters a particular type of financial institution, federal law cannot confer on that institution powers that the state charter has expressly denied it. *See* 296 U.S. at 343. *Hopkins* also recognizes that the federal government *may* regulate the activities of state corporations "when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred." *Id.* at 337. Congress has the unquestioned power (under the Commerce Clause, as augmented by the Necessary and Proper Clause) to regulate the supervision of national banks. Because that power necessarily extends to regulation of national banks' exercise of their incidental powers, including engaging in lending through operating subsidiaries, *Hopkins* does not speak to the preemption issue in this case. *See id.* at 343 ("No question is here as to the scope of . . . the power to regulate transactions affecting interstate or foreign commerce"). Thus, assuming *arguendo* that *Hopkins* remains good law, it has no bearing on the issues before the Court.

Where, as here, Congress exercises its enumerated powers, the resultant displacement of conflicting state law is mandated by the Supremacy Clause, and does not even implicate, much less violate, the Tenth Amendment or general concerns of federalism and state sovereignty. *See Gonzales* v. *Raich*, 545 U.S. 1, 41-42 (2005) (Scalia, J., concurring in the judgment). There is no constitutional issue in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 05-1342

In the Supreme Court of the United States

LINDA A. WATTERS, COMMISSIONER,
MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES,

Petitioner,

v.

WACHOVIA BANK, N.A., AND WACHOVIA MORTGAGE CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

This is such a case. The Chamber's members include not only national banks and their operating subsidiaries but also millions of other businesses subject to federal statutes and regulations that preempt state and local laws. The power of Congress (either directly or through administrative agencies) to preempt state and local law is vitally important to business and to the national economy. Accordingly, the Chamber and its members have a substantial interest in ensuring that this Court properly resolves the issues raised in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents important issues of preemption law that arise in the distinctive setting of the federal government's long-standing oversight and regulation of nationally chartered banks pursuant to the National Bank Act, 12 U.S.C. §§ 1 *et seq.*, a

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

statute enacted during the Civil War to "protect[]" the banking system "from possible unfriendly State legislation." *Beneficial National Bank* v. *Anderson*, 539 U.S. 1, 10 (2003) (internal quotations omitted). Specifically, the Court is called on to decide whether the National Bank Act and certain regulations of the Office of the Comptroller of the Currency ("OCC") preempt various Michigan laws relating to mortgage lenders insofar as those state laws are applied to the operating subsidiaries of nationally chartered banks ("operating subs"). Like every other federal court to face the question, the Sixth Circuit in this case had no difficulty concluding that the Michigan statutes as applied to such operating subs are preempted. Pet. App. 3a, 4a-12a. That decision was correct and should be affirmed.

As respondents and other *amici* supporting respondents demonstrate, this case can – and should – be decided on comparatively narrow grounds. The National Bank Act includes an express preemption clause broadly declaring that "[n]o national bank shall be subject to *any* visitorial powers except as authorized by Federal law" (12 U.S.C. § 484(a) (emphasis added)), confers on national banks the authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking" (*id.* § 24 (Seventh)) as well as to engage in real estate lending "subject to * * * such restrictions and requirements as the Comptroller * * * may prescribe by regulation or order" (*id.* § 371(a)), and grants the Comptroller broad authority to "prescribe rules and regulations to carry out the responsibilities of the office" (*id.* § 93a). Pursuant to that delegated authority, the OCC has made clear, in a series of regulations, that the incidental powers of national banks under Section 24 (Seventh) include the power to establish, and conduct federally authorized banking activities through, operating subs. 12 C.F.R. §§ 5.34(e), 7.4006. Those regulations also establish that such operating subs must conduct their activities "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by [the] parent national bank" (*id.* § 5.34(e)(3)) and that "[s]tate laws apply to national bank operating subsidiaries to the same extent that those laws apply

to the parent national bank" (*id.* § 7.4006). In distinguishing "financial" from operating subs, Congress has also indicated that operating subs must conduct their activities "subject to the same terms and conditions that govern * * * national banks." 12 U.S.C. § 24(a)(g)(3).

It is undisputed that these statutes and regulations bar Michigan from applying the laws at issue in this case directly to a national bank. Petitioner contends, however, that there is no preemption if the same laws are applied to the activities of a national bank that happen to be conducted through an operating subsidiary. To agree with that submission, this Court would have to reject the contrary conclusion of the OCC as expressed in its regulations, reject the OCC's interpretation of substantive provisions of the National Bank Act, and reject the agency's determination that Michigan's laws undermine the incidental powers of national banks conferred by Section 24 (Seventh). But this Court has *already* made clear that the Comptroller's reasonable construction of the scope of a national bank's "incidental powers" under Section 24 (Seventh) is entitled to "great weight" and full deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995). That principle dooms petitioner's challenge to the decision below.

Because petitioner cannot prevail under settled principles, she and her *amici* urge this Court to alter the legal framework governing regulatory preemption. These arguments are wrong and should be rejected. At bottom, they reflect a basic misunderstanding of the role and importance of federal preemption in our constitutional scheme.

I. Federal preemption of state and local law is not "extraordinary" (as petitioner repeatedly suggests) but rather is an ordinary, commonplace, and highly beneficial feature of our system of government. By virtue of the Supremacy Clause, *all* forms of federal law – including regulations issued by administrative agencies – have a preemptive effect on state and local law

insofar as the latter conflicts with or frustrates the purposes of federal law. This Court has long distinguished between these forms of "implied" preemption (sometimes described as "conflict" and "obstacle" preemption) that flow directly from the Supremacy Clause and "express" preemption, which occurs when Congress elects to regulate preemptively pursuant to its enumerated powers in Article I, Section 8, of the Constitution (including the Necessary and Proper Clause). Congress's exercise of preemptive lawmaking authority in this fashion raises no concern under the Tenth Amendment.

Petitioner's invocation of a "clear statement" rule and the "presumption against preemption" is misplaced. Those interpretive canons are irrelevant to this case, because the regulation of national banks (and their mortgage lending activities) is an area of traditional *federal* concern. In any event, no "clear statement" rule exists in the preemption area, because the most relevant provision of the Constitution – the Supremacy Clause – points in the opposite direction. If the Court concludes that the "presumption against preemption" does apply to this case, then it should take this opportunity to reexamine that doctrine in light of the persuasive criticisms against it by Members of this Court, prominent legal scholars, and litigants in previous cases.

Contrary to petitioner's suggestion, federal preemption of state and local law is exceedingly common – and it poses no threat to federalism. Congress has enacted many statutes with express preemption clauses in a very wide array of settings. Many of those statutes take into account federalism concerns through the creation of limits on preemption, exceptions, and procedures through which state and local governments may seek exemptions from preemption. Still other procedural and consultation rights are provided to state and local governments by the Administrative Procedure Act and by Executive Order 13,132. Federal regulations that expressly preempt state and local law are also common. The federal banking laws and OCC's regulations also reflect an awareness and accommodation of federalism concerns.

There are many excellent reasons why Congress – and administrative agencies – elect to preempt state and local laws. Federal preemption replaces a welter of divergent regulatory requirements imposed by state and local governments with a single, uniform federal rule. It reduces the regulatory burdens on business – and therefore the costs of producing goods and services (leading in many instances to lower prices for consumers). It helps to create and foster unified national markets. Under many preemption regimes created by Congress, it ensures that the rules will be formulated by expert administrative agencies with the benefit of input from all affected parties (including state and local governments) rather than by lay juries, town councils, and other more parochial and less expert regulators. And federal preemption is essential to carrying out any program of *deregulation* at the national level.

II. The OCC's regulations in this case are authorized by the National Bank Act, reflect the agency's interpretations of substantive provisions of that statute, and are entitled to *Chevron* deference under this Court's decisions. See, *e.g.*, *NationsBank*, 513 U.S. at 256-57. Because the Michigan laws at issue in this case squarely conflict with the OCC's regulations, the Michigan laws are preempted by the Supremacy Clause. This Court does not need to go any further to resolve this case.

If the Court does go further, however, it should reject petitioner's request to alter the core principles governing regulatory preemption. There is no merit to petitioner's submission (which this Court has repeatedly rejected) that administrative agencies lack the authority to regulate preemptively unless Congress has explicitly delegated that power. The Court should also reject petitioner's invitation to rule that certain agency interpretations that result in preemption of state and local laws should be accorded no weight by courts or only limited deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Finally, the reasons advanced for why this Court should carve out a new exception to the *Chevron* doctrine are equally unpersuasive and should be rejected.

ARGUMENT

I. FEDERAL PREEMPTION IS AN ORDINARY, UBIQUITOUS, AND HIGHLY BENEFICIAL FEATURE OF OUR SYSTEM OF GOVERNMENT THAT POSES NO THREAT TO FEDERALISM

From the briefs submitted by petitioner and her *amici*, one might think that Congress's "authority * * * to preempt State laws is an extraordinary power" that threatens to "upset the usual constitutional balance of federal and state powers" and even "intrudes on State sovereignty in violation of the Tenth Amendment." Pet. Br. 11, 26 (internal quotations omitted); see also Br. of the Nat'l Conference of State Legislatures *et al.* ("NCSL Br."), at 4, 15. Building on that premise, petitioner and her *amici* urge the Court to apply a variety of special rules in interpreting the relevant provisions of the National Bank Act and the OCC's regulations and in applying the *Chevron* doctrine – special rules that would not apply if no issue of preemption were raised. See, *e.g.*, Pet. Br. 27 (urging application of a "clear statement" rule).

As we explain below, these arguments largely depend on a mistaken premise – that federal preemption of state and local law is unusual, troubling, constitutionally suspect, and a threat to federalism. In fact, Congress's power to regulate preemptively is beyond dispute and highly beneficial – and Congress ordinarily takes into account, and accommodates, federalism concerns in the preemptive regulatory regimes it creates (including the federal banking statutes). Because so much of petitioner's (and her *amici*'s) arguments are based on a misunderstanding of the constitutional source and status of Congress's power to preempt, it is important to clarify that issue at the outset.

A. The Supremacy Clause, Congress's Power To Regulate Preemptively, And The Distinction Between Express And Implied Preemption

1. Far from being an anomaly or a threat to our system of government, federal preemption of state and local law is an ordinary – and indispensable – incident of our constitutional

scheme. *All* federal laws – including statutes passed by Congress, regulations or rules issued by administrative agencies, and treaties – are preemptive of state and local law to the extent that the latter impose conflicting obligations or requirements. Thus, once Congress passes a law requiring all interstate buses to be lime green, every state, local, and municipal government is thereby precluded from passing laws or ordinances that would punish owners of interstate buses for painting them green or would require those buses to be purple or even forest green.

This result is not anomalous or in any way "extraordinary"; it flows directly from the Supremacy Clause of the Constitution, which the Framers included to remedy a glaring shortcoming of the Articles of Confederation and which broadly provides that "the Laws of the United States * * * shall be the supreme Law of the Land * * * *any* Thing in the *Constitution or Laws* of *any* State *to the Contrary notwithstanding*." U.S. CONST. art. VI, cl. 2 (emphasis added). See *City of New York* v. *FCC*, 486 U.S. 57 (1988) ("The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.").

In the last century (and particularly since the New Deal), there has been a vast expansion of federal law in all forms – especially statutes and regulations. By virtue of the Supremacy Clause, the inevitable consequence of that expansion is to restrict the residual authority and police power of state and local governments to take actions that conflict with federal law. *New York* v. *United States*, 505 U.S. 144, 159 (1992) ("As the Federal Government's willingness to exercise power within the confines of the Constitution has grown, the authority of the States has correspondingly diminished to the extent that federal and state policies have conflicted."). This dynamic helps to explain why preemption is so common today and why preemption cases are a regular component of this Court's docket.

2. The Supremacy Clause comes into play only at the post-enactment stage and specifies a rule of federal supremacy when federal and state law conflict. See Viet Dinh, *Reassessing the*

Law of Preemption, 88 GEO. L.J. 2085, 2089-90 (2000) (Supremacy Clause "is relevant only at the post-enactment stage, where a state law conflicts to some degree with a federal law"). This Court has explained the meaning of the Supremacy Clause in a body of cases involving the doctrine of "implied" preemption, a term used to describe situations where there is no explicit preemptive command by Congress ("express" preemption).

The Court has identified several types of implied preemption. Implied *field* preemption occurs where federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Implied *conflict* preemption can take a number of forms, ranging from situations where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963), to ordinary conflicts between state and federal law, to cases where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

In resolving cases involving implied conflict preemption, courts undertake three steps: (1) determine the meaning of the federal law in question; (2) determine the meaning of the pertinent state law; and (3) evaluate whether there is sufficient tension or incompatibility between the state and federal provisions to trigger the Supremacy Clause. The first two steps involve questions of statutory construction identical (at least with respect to interpretation of the relevant *federal* statute) to the kinds of interpretations that, when made by administrative agencies, fall within the heartland of the *Chevron* doctrine.[2]

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[2] Only the third step – evaluating the extent of the conflict and whether it suffices to require preemption – arguably involves the resolution of any issue of "constitutional" law. Br. of the Center for State Enforcement of Antitrust Laws, Inc., at 8-9. But even that step may depend upon technical or policy-based judgments about the practical effect of state law on the efficient and effective operation of a complex statutory and

3. Congress's power to legislate preemptively is *not* derived from the Supremacy Clause (which, as explained above, comes into play only at the post-enactment stage). Rather, it flows from the enumerated powers in Article I of the Constitution, including Congress's authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution" those enumerated powers. U.S. CONST. art. I, § 8. It is Congress's enumerated powers that establish "[a] fundamental principle of the Constitution" – "that Congress has the power to preempt state law." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000).

This constitutional basis is important because it explains why, contrary to the suggestion of petitioner and her *amici*, the exercise of preemptive authority by Congress raises no concern under the Tenth Amendment, which provides that "[t]he powers *not delegated* to the United States by the Constitution, nor prohibited by it to the States, *are reserved* to the States respectively, or to the people." U.S. CONST. amend. X (emphasis added). "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has *not* conferred on Congress." *New York* v. *United States*, 505 U.S. at 156 (emphasis added).

Because Congress's power to legislative preemptively is beyond challenge, the only issue in most cases involving "express" preemption is what Congress *intended*. When Congress includes an express preemption clause in a statute (as it did in Section 484 of the National Bank Act), Congress's intent to preempt state law is obvious and the only remaining issue is the extent of preemption intended. This is an issue of pure statutory

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regulatory scheme – judgments that administrative agencies are uniquely well-suited to make. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects[.]").

interpretation – it is not a "constitutional" issue, as petitioner's *amici* suggest. See Br. of the Center for State Enforcement of Antitrust Laws, Inc. ("Center Br."), at 8-9. Like other issues of statutory interpretation, that question is properly resolved by examining the text, structure and legislative history of the relevant statute. That, too, is precisely what administrative agencies do in resolving ambiguities in statutes they administer – again, an interpretive task that falls into the heartland of what the *Chevron* doctrine covers.

B. "Clear Statement" Rules And The "Presumption Against Preemption"

Petitioner and her *amici* urge this Court to apply a "clear statement" rule or a "presumption against preemption." Pet. Br. 23, 26-27; Br. of Charles W. Turnbaugh, at 11, 19-24. As respondents demonstrate, however, those canons do not apply to this case because the regulation of national banks – including the definition of their "incidental powers" – has long been a subject regulated by the federal government. See *United States v. Locke*, 529 U.S. 89, 108 (2000) (presumption against preemption "is not triggered when [a] State regulates in an area where there has been a history of significant federal presence").

Although that is sufficient reason to reject petitioner's proposed rules of construction, those rules also suffer from more fundamental flaws. For starters, there should not be any "clear statement" rule in the law of preemption, and this Court generally has not used that terminology in its preemption decisions. With good reason: This Court has deployed "clear statement" rules – the strongest form of a federalism-based "substantive" canon of construction – only in areas involving intergovernmental immunity or federal interference with the operations of state government. W. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 354-62 (2000).[3] See, *e.g.*,

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[3] Professor Eskridge distinguishes among *textual* or *linguistic* canons of construction (which embody "general conventions of language, grammar, and syntax"), *referential* canons (which "refer the Court to an outside or

Gregory v. *Ashcroft*, 501 U.S. 452, 460-61 (1991) (Congress will not be understood to have intruded on "a decision of the most fundamental sort for a sovereign entity," implicating "the structure of [state] government," unless Congress says so in unmistakably clear language); *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention *unmistakably clear* in the language of the statute.") (emphasis added).

In these situations, a "clear statement" rule finds support in constitutional text (such as the Eleventh Amendment). In pre-emption cases, by contrast, the most pertinent constitutional text – the Supremacy Clause – points *in exactly the opposite direction* (in favor of, not against, preemption).[4]

To be sure, this Court has sometimes referred to a weaker federalism-based canon of construction: the "presumption against preemption." But that interpretive rule has not been

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preexisting source to determine statutory meaning"), and *substantive* canons of construction that are "even more controversial, because they are rooted in broader policy or value judgments" and "attempt to harmonize statutory meaning with policies rooted in the common law, other statutes, or the Constitution." W. ESKRIDGE ET AL., *supra*, at 329-30. See also note 4, *infra*.

[4] Justice Scalia has questioned the wisdom of using "preferential rules and presumptions" generally in statutory construction cases, explaining:

> It is hard enough to provide a uniform, objective answer to the question whether a statute, on balance, more reasonably means one thing than another. But it is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight. * * * [W]hether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it.

A. SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 28-29 (1997).

consistently applied and is not free from controversy. It has been described by this Court as "artificial," *Locke*, 529 U.S. at 107-08, ignored in many recent cases, *e.g.*, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 63 (2002) (relying on "natural[] read[ing]" of express preemption clause without any mention of presumption), and squarely rejected as a guide to interpreting express preemption clauses by at least two Members of this Court, *e.g.*, *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 544 (1992) (Scalia, J., joined by Thomas, J., concurring in the judgment in part and dissenting in part) ("Under the Supremacy Clause, * * * our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning."); *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 457 (2005) (opinion of Thomas, J.) (same). See also *Engine Manufacturers Ass'n* v. *South Coast Air Quality Management Dist.*, 541 U.S. 246, 256 (2004) (observing that "not all Members of this Court agree" on the use of a "presumption against preemption").

The presumption has also come under attack in recent years from legal scholars. See, *e.g.*, Dinh, *supra*, 88 GEO. L.J. at 2087 ("the constitutional structure of federalism does not admit to a general presumption against federal preemption of state law"); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 S. CT. REV. 175, 182 (presumption is "difficult to justify" on constitutional grounds); Paul Clement & Viet Dinh, *When Uncle Sam Steps In: There's No Real Disharmony Between High Court Decisions Backing Pre-emption And The Federalism Push of Recent Years*, LEGAL TIMES, June 19, 2000, at 66 (arguing that the presumption "finds no support in the structure of the Constitution"). Professor Nelson of the University of Virginia Law School has argued, based on a detailed analysis of long-overlooked historical materials, that the presumption against preemption is contrary to the text of the Supremacy Clause itself, properly understood. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 235-64, 292-93 (2000).[5] Although the

[5] As Professor Nelson has demonstrated, the Framers understood the

dissenting Justices in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 908 n.22 (2000), made a passing reference to Professor Nelson's argument, and Justice Thomas's separate opinion in *Bates* cited the article favorably in explaining why the "presumption" was irrelevant (see 544 U.S. at 457), this Court has not directly addressed the argument or examined the substantial historical evidence marshaled by Professor Nelson.

Other scholars have traced the history of the preemption doctrine and concluded that, far from being deeply rooted in our legal traditions, the "presumption against preemption" was not recognized by this Court until the 1920s and 1930s. See Mary Davis, *Unmasking The Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 973-83 (2002); Stephen Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 785-808 (1994). Indeed, in the first several decades of the twentieth century, this Court recognized a strong generalized presumption *in favor of* preemption. Davis, *supra*, 53 S.C. L. REV. at 1026; Gardbaum, *supra*, 79 CORNELL L. REV. at 801-08. This contrary presumption is still recognized by this Court when Congress acts in an area "where the federal interest" is "dominant." *E.g.*, *Hines* v. *Davidowitz*, 312 U.S. 52, 62, 68 (1941) (in "the general field of foreign affairs, including power over immigration," state authority must be "restricted to the narrowest of limits").

In several recent cases, the Chamber and other national business groups have filed *amicus* briefs criticizing the "presumption against preemption" on multiple grounds. See, *e.g.*,

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phrase "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" as a "*non obstante*" clause. Such clauses were understood by the courts as a directive *not* to employ the traditional presumption against implied repeals (which might induce strained interpretations to harmonize a federal law with an earlier state regulation), but rather to give a federal statute its most reasonable construction and allow it to displace whatever state law it contravened when so construed. 86 VA. L. REV. at 232, 235-44, 291-303. The *non obstante* form of the Supremacy Clause, then, suggests that judges should *not* automatically prefer a narrow interpretation of a federal statute to avoid the conclusion that it contradicts (and hence preempts) state laws. *Id.* at 232, 245-64.

Br. of the Product Liability Advisory Council, Inc. and the Chamber of Commerce of the United States of America, *United States* v. *Locke*, Nos. 98-1701 and 98-1706, 1999 WL 966527, at *4-12; Chamber Br., *Geier* v. *American Honda Motor Co.*, No. 98-1811, 1999 WL 1049891, at *25-26. Those briefs have demonstrated that the presumption is of relatively recent vintage, has been applied in an inconsistent fashion, suffers from a number of serious ambiguities, and is fundamentally at odds with central principles of preemption law – including that principle that Congress's *intent* determines the scope of express preemption.[6] If the Court concludes (contrary to respondents' submission) that the "presumption against preemption" has any application at all to this case, then it should take this opportunity to reexamine – and abandon or substantially limit – that questionable doctrine.

C. Federal Preemption Is Exceedingly Common And Highly Beneficial

1. Throughout their briefs, petitioner and her *amici* suggest that federal preemption of state law is "extraordinary" and unusual. Pet. Br. 10, 23; NCSL Br. 4, 15. This is untrue. As explained above, the expansion of federal law in its various forms since the New Deal has brought with it a growing sphere of preemption "by direct operation of the Supremacy Clause." *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l*

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[6] The idea that the presumption rests on principles of federalism is also in tension with the well-settled principle that the importance of a state's interest in a law that is allegedly preempted is *wholly irrelevant* to the preemption analysis. See, *e.g.*, *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) ("These principles [governing preemption analysis] are not inapplicable here simply because real property law is a matter of special concern to the States: 'The relative importance to the State of its own law is not material when there is a conflict with valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'") (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)); *DeCanas* v. *Bica*, 424 U.S. 351, 357 (1976) ("[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation.").

Union Local 54, 468 U.S. 491, 501 (1984). The more federal statutes and regulations there are on the books, the larger is the domain of potentially conflicting requirements that state and local governments are barred from enacting.

Moreover, Congress has passed an extraordinarily wide array of statutes that expressly preempt specified areas of state and local law. In addition to 12 U.S.C. § 484(a) and other provisions of the federal banking laws, these include the Federal Election Campaign Act, 2 U.S.C. § 453; the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v; the Packers and Stockyard Act, *id.* § 228c; the Agricultural Marketing Act, *id.* § 1626h; the Plant Protection Act, *id.* § 7756; the Federal Hazardous Substances Act, 15 U.S.C. § 1261 note; the Child Safety Protection Act, *id.* § 1278 note; the Federal Cigarette Labeling and Advertising Act, *id.* § 1334; the Fair Packaging and Labeling Act, *id.* § 1461; the Magnuson-Moss Warranty Act, *id.* § 2311(c); the Terrorism Risk Insurance Act of 2002, *id.* § 6701 note; and the Nutritional Education and Labeling Act, 21 U.S.C. § 343-1.[7] Of course, this list represents only a small fraction of the express preemption provisions currently on the books. Federal preemption is also very common in the areas of copyright, bankruptcy, telecommunications, and labor law.

According to one survey, "[t]he pace and breadth of federal preemptions of state and local authority have increased signifi-

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[7] Other examples include the Poultry Products Inspection Act, 21 U.S.C.§ 467e; the Federal Meat Inspection Act, *id.* § 678; the Egg Products Inspection Act, *id.* § 1052; the Occupational Safety and Health Act, 29 U.S.C. § 667; the Employee Retirement Income Security Act ("ERISA"), *id.* § 1144(a); the Price-Anderson Act, 42 U.S.C. §§ 2210(n)(2), 2014(hh); the Clean Air Act, 42 U.S.C. §§ 7543(a), 7573; the Volunteer Protection Act of 1997, *id.* § 14502; the Hazardous Materials Transportation Uniform Safety Act, 49 U.S.C. § 5125; the Federal Aviation Administration Authorization Act, *id.* § 14501(c); the Safety Appliance Acts, 49 U.S.C. §§ 20301-20306; the Surface Transportation Assistance Act, *id.* § 31114(a); and the General Aviation Revitalization Act, *id.* § 40101 note. See pages 18-20, 25-27, *infra* (discussing additional statutes).

cantly since the late 1960s." U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY: HISTORY, INVENTORY, ISSUES, at iii (1992). Thus, "[o]f the approximately 439 significant preemption statutes enacted by the Congress since 1789, more than 53 percent (233) have been enacted only since 1969." *Ibid.*

Preemptive federal *regulations* are also quite common. As explained above, *all* federal regulations are preemptive under the Supremacy Clause insofar as they bar the states from imposing conflicting obligations. But a wide range of administrative agencies also commonly do what the OCC has done here: issue regulations that expressly provide that some domain of state and local law is nullified.[8] Thus, it is simply not true that federal regulations that expressly preempt state law are "thoroughly incompatible with our legal traditions." Center Br. 27.

2. That federal preemption is so common today is hardly surprising. After all, there are many excellent reasons why Congress – and administrative agencies – choose to preempt state and local laws. By last count, there were approximately 87,525 local governmental units in the United States, including more than 3,000 counties, more than 19,000 municipalities, and more than 16,000 towns or townships. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 262 (2004). When Congress prescribes a single set of uniform rules for the entire country, it reduces or eliminates the burdens that

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[8] See, *e.g.*, 5 C.F.R. § 875 (recognizing Office of Personnel Management's preemptive authority over state insurance regulations concerning terms and rates of certain long-term care insurance offered to federal civil servants); 7 C.F.R. § 400.710 (preempting state and local laws imposing taxes on certain federal crop insurance plans and policies); 7 C.F.R. § 1717.301 (preempting state regulatory authority over rates charged by power supply borrowers where rates would compromise federal interests); 10 C.F.R. § 431.26 (preempting certain state regulations that, among other things, set energy conservation standards for electric motors); 11 C.F.R. § 100.93(g) (preempting certain state and local laws "with respect to travel in connection with a Federal election").

flow from multifarious (and even conflicting) legal and regulatory requirements imposed by 50 States and thousands of municipal and local governments.

Federal preemption helps to create a unified national marketplace for goods and services, reduces the barriers to new entry by small businesses, and lowers the cost of doing business (which in turn often results in reduced costs of goods and services to consumers). In many cases, it also ensures that the legal rules governing complex areas of the economy are formulated by expert federal regulators with a broad national perspective rather than by decisionmakers – such as municipal officials, elected state judges, and lay juries – with a far more parochial perspective and limited set of information. See *Geier*, 529 U.S. at 871 (observing that preemption clause "suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create"). Beyond that, the doctrine of federal preemption is the *sine qua non* of any effective policy of deregulation carried out by the political branches of government at the national level.

D. Congress Itself Frequently Addresses The Federalism Concerns Pressed By Petitioner And Her *Amici*

There is another reason why petitioner and her *amici* are wrong in suggesting that Congress's exercise of preemptive legislative power is destructive of federalism and that the OCC (and other federal administrative agencies) are insufficiently attentive to federalism concerns. Petitioner overlooks not only the political safeguards of federalism that exist in the national lawmaking process, see *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550-54 (1985), but also Congress's *own handiwork* in creating preemptive regulatory schemes – including the federal banking laws. She also ignores additional steps taken by Congress, the Executive Branch generally and OCC in particular to ensure that federalism concerns are considered.

1. As respondents show, the federal banking statutes and OCC's regulations contain a variety of provisions that reflect Congress's (and the OCC's) awareness of federalism issues and solicitude for state prerogatives in regulating specified activities. See, *e.g.*, 12 U.S.C. § 1844(c)(4)(A) (recognizing certain state authority to regulate "[s]ecurities activities" that are "conducted in a functionally regulated subsidiary of a depository institution"); *id.* § 1844(c)(4)(B) (same for "insurance agency and brokerage activities and activities as principal"); 12 C.F.R. § 34.4(b) (specifying, among other things, that state contract, taxation, and zoning laws are not preempted as applied to national banks' real estate lending powers). Moreover, in a few specific areas (such as branching and interest rates), Congress has elected to define the power of national banks by reference to the powers granted to state banks in the state where the national bank is located. See 12 U.S.C. §§ 36, 85. And Congress has directed the OCC to follow notice-and-comment procedures "[b]efore issuing any opinion letter or interpretive rule * * * that concludes that Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches." 12 U.S.C. § 43(a).

2. Other preemptive federal schemes outside of the area of banking law also include special safeguards – both substantive and procedural – that protect and preserve the authority of state and local governments to regulate and to meet their own operational needs. The existence of these provisions – which are so often overlooked by courts in preemption cases – confirms that, contrary to petitioner's submission, the political safeguards of federalism are in very good working order.

Five examples of Congress's accommodation of state and local governments' interests in other preemption settings are illustrative. *First*, Congress often elects *only* to preempt state and local laws that *are different from* federal law, thus leaving intact state and local laws that are identical or similar to federal mandates. See, *e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2075(a) (preempting state safety standards "unless such

requirements are identical to the requirements of the Federal standard"); Medical Device Amendments, 21 U.S.C. § 360k(a).

Second, Congress frequently places an exclusion within express preemption clauses for goods or products purchased by states or local governments *for their own use*. Examples include the preemption provisions of the Flammable Fabrics Act, 15 U.S.C. § 1203(b), the Federal Hazardous Substances Act, 15 U.S.C. § 1261 note, and the Poison Prevention Packaging Act, 15 U.S.C. § 1476(b). These exclusions preserve the authority and autonomy of state and local governments to make procurement and spending decisions.

Third, Congress sometimes includes in a preemption scheme an exception for state or local requirements that are *needed to address special or unique local conditions*. The Federal Railroad Safety Act, for example, excludes certain "additional or more stringent" measures taken by a state "related to railroad safety or security" where the state's regulation, among other things, "is necessary to eliminate or reduce an essentially local safety or security hazard." 49 U.S.C. § 20106. See also 46 U.S.C. § 4306 (Boat Safety Act) (excluding certain state or local regulations concerning "uniquely hazardous conditions or circumstances within the State").

Fourth, Congress often *authorizes the granting of exemptions* to state and local governments under an express preemption scheme. Although these provisions vary somewhat in form, they typically allow the administrative agency to grant exemptions if a state or local standard: (1) provides a higher degree of protection than applicable federal standards; (2) does not unduly burden interstate commerce; and (3) does not cause the product to be in violation of any federal requirements. See, *e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2617(b); Federal Hazardous Substances Act, 15 U.S.C. § 1261 note.

Fifth, Congress has sometimes specifically created a role for the states *in setting the preemptive federal standards*. The Federal Boat Safety Act, for example, provides for state input into the Coast Guard's process of formulating uniform federal

design standards for recreational boats. The Coast Guard is required to "consult with" the National Boating Safety Advisory Council ("NBSAC"), 46 U.S.C. § 4302(c)(4), a group of experts and other persons interested in boat safety. One-third of the 21 members of the NBSAC must be state officials responsible for state boat safety programs. See *id.* § 13110(b)(1).

3. Finally, Congress and the Executive Branch have created additional *procedures* that give state and local governments the opportunity to be heard before federal administrative agencies issue regulations that would preempt state and local authority. In preemption statutes that authorize the administering agency to grant exemptions from preemption, Congress often provides state and local governments with the opportunity for an administrative hearing on their requests for an exemption from preemption. See, *e.g.*, 21 U.S.C. § 360k(b) (Medical Device Amendments). More generally, the Administrative Procedure Act is itself a federalism safeguard because it requires an agency engaged in informal rulemaking to provide notice and an opportunity to be heard to all interested parties. 5 U.S.C. § 553(c); see also *id.* § 553(e) (requiring every agency to give interested parties "the right to petition for the issuance, amendment, or repeal of a rule"). If unsuccessful in obtaining an exemption from preemption or in opposing a preemptive regulation, state and local governments may seek judicial review of adverse agency action in the federal courts.[9]

4. Thus, Congress knows full well how to take into account the prerogatives of state and local governments in designing preemptive federal schemes, including the federal banking laws. There is accordingly no need for this Court to bend over backwards by systematically disfavoring the outcome of preemption. Congress's frequent use of these various methods of accommodating state and local interests confirms the funda-

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[9] The Executive Branch has imposed additional consultation requirements on administrative agencies that are contemplating preemptive regulatory action. See Executive Order 13,132, 64 Fed. Reg. 43,255, §§ 4(d), (e), 6 (Aug. 4, 1999).

mental point made in *Garcia*: the political safeguards of federalism are alive and well. And Congress's decision not to include *additional* safeguards in the National Bank Act – such as a procedure for seeking exemptions from preemption – should be regarded not as happenstance but as a deliberate choice.

II. THIS COURT SHOULD DECLINE PETITIONER'S INVITATION TO ALTER THE ESTABLISHED LEGAL FRAMEWORK GOVERNING REGULATORY PREEMPTION

The Chamber agrees with respondents that the relevant OCC regulations are authorized by the National Bank Act, reflect the agency's interpretations of substantive provisions of that statute, and are entitled to *Chevron* deference under this Court's decisions. Because they plainly conflict with the OCC's regulations, the Michigan laws at issue are preempted by the Supremacy Clause. The Court need go no further.

Accordingly, there is no need to address the degree of deference owed to either (1) the OCC's interpretation of the National Bank Act's provisions specifying that operating subs are to be "subject to the same terms and conditions" as national banks (12 U.S.C. § 24a(g)(3)) and expressly preempting state visitorial powers over national banks (12 U.S.C. § 484(a)), or (2) the agency's assessment of whether state regulations of the kind involved here conflict with or frustrate the purposes underlying the National Bank Act and the OCC's regulations. If there were a need to address these issues, however, this Court's decisions establish that substantial deference is owed to the agency in both of these settings. In *Medtronic Inc.* v. *Lohr*, 518 U.S. 470, 496 (1996), this Court gave "substantial weight" to the FDA's interpretation of the express preemption clause of the Medical Device Amendments, 21 U.S.C. § 360k(a), and it explained that the agency was "uniquely qualified" to determine whether state law undermines Congress's purposes. And in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 883-84 (2000), this Court deferred to the Department of Transportation's views concerning the objectives underlying an agency

safety standard and the extent to which state law would pose an obstacle to the accomplishment of those objectives.

Petitioner and her *amici* ask this Court to make significant changes to settled law. Thus, they urge the Court to hold that an administrative agency lacks the authority to regulate preemptively *unless* Congress has specifically conferred preemptive regulatory authority on the agency. They also contend that the OCC's views with respect to preemption are entitled to little or no weight and are subject, at most, to minimal deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). These arguments are meritless and should be rejected.

A. The Power Of An Administrative Agency To Regulate Preemptively Is Not Contingent On An Express Delegation By Congress Of Preemptive Authority

In *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982), this Court examined "the pre-emptive effect of a regulation, issued by the Federal Home Loan Bank Board (Board), permitting federal savings and loan associations to use 'due-on-sale' clauses in their mortgage contracts." *Id.* at 144. In a statement issued with the final publication of the due-on-sale regulation, the Board "explained its intent that the due-on-sale practices of federal savings and loans be governed 'exclusively by Federal law.'" *Id.* at 147. A California court recognized that the Board intended to preempt state law that conflicted with its due-on-sale regulation, but nonetheless "refused to 'equate the *Board's* expression of intent with the requisite *congressional* intent.'" *Id.* at 150 (emphasis in original).

In rejecting the lower court's approach, this Court explained:

> Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review *only* to determine whether he has exceeded his statutory authority or acted arbitrarily. When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry *is similarly limited*: "If [h]is choice represents a reasonable accommodation of conflicting policies

> that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *A pre-emptive regulation's force* ***does not depend*** *on express congressional authorization to displace state law* * * * .

de la Cuesta, 458 U.S. at 153-54 (emphases added) (quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)). This Court has applied these principles both before and after *Chevron*. See, *e.g.*, *City of New York* v. *FCC*, 486 U.S. 57, 63-69 (1988); *Hillsborough County, Fla.* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714-15, 721 (1985); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699-705, 708-09 (1984).

In *New York* v. *FERC*, 535 U.S. 1 (2002), the Court recently reaffirmed its traditional approach, squarely rejecting the argument that the "presumption against preemption" should be applied in deciding whether an agency has the authority to take regulatory action that preempts state law. The "presumption against preemption," the Court explained, has no bearing on issues relating to "the proper scope of * * * federal power" (including an agency's power to preempt state law). *Id.* at 18. The only question is "whether Congress has given [the agency] the power to act as it has," and that question is resolved "without any presumption one way or the other." *Ibid.*

This approach is entirely sensible. Once Congress has delegated rulemaking power to an agency, the agency steps into Congress's shoes as the decisionmaker – its job becomes implementing the statute in whatever way best accomplishes the statutory aims. See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) ("We accord deference to agencies under *Chevron* * * * because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."); *Crisp*, 467 U.S. at 708.

Because an agency is left to make policy choices, it need not shy away from preemption; it need adhere only to the presumption that Congress wanted the statute administered effectively. The agency is no more obligated to avoid preemption than is *Congress* when determining whether federal regulation should be exclusive.

Once this Court determines that the agency has the power to administer the statute, the focus shifts to whether *the agency* (not Congress) intended its regulations to preempt state law. For example, in *Hillsborough County*, the Food and Drug Administration (FDA) issued a statement at the time its regulations were promulgated *disclaiming* an intent to preempt state law. The Court found this disclaimer "*dispositive* on the question of implicit intent to pre-empt"; so long as the agency acted within the scope of its statutory authority, *it* (not Congress) had the discretion to decide whether to preempt state law. 471 U.S. at 714-15 (citing *Chevron*, 467 U.S. at 842-45) (emphasis added). Moreover, this Court observed that "the FDA possesses the authority to promulgate regulations pre-empting local legislation that imperils the supply of plasma *and can do so with relative ease*." *Id.* at 721 (emphasis added).

Despite this unbroken line of decisions, petitioner and her *amici* ask this Court to curtail significantly the power of federal agencies to issue preemptive regulations by holding that such power exists *only* where Congress explicitly grants the power to regulate preemptively. Pet. Br. 33-35; Center Br. 25-28. Contrary to the Center's suggestion (Br. 1, 28), this would hardly amount to a mere "clarification" of this Court's decisions. It would bring about a major and unwarranted change, in effect overruling *de la Cuesta* and its progeny.

Equally mistaken is the Center's suggestion (Br. 26-28) that this line of cases can be explained away as turning on "straightforward question[s]" of implied "conflict preemption" under the Supremacy Clause. In fact, this Court has made clear that the *de la Cuesta* framework applies even when an administrative agency elects to "render unenforceable state or local laws that

are *otherwise not inconsistent with federal law.*" *City of New York*, 486 U.S. at 63-64 (emphasis added); see also *Crisp*, 467 U.S. at 705 ("*Quite apart from* this *generalized* federal preemption of state regulation of cable signal carriage [under the FCC's regulations], the Oklahoma advertising plainly conflicts with specific federal regulations.") (emphasis added). That this Court in *de la Cuesta* "provided an apt summary of" preemption doctrine (Center Br. 27) is further reason to reject *amicus*'s suggestion that the Court somehow overlooked preemption principles in deciding that case.

Thus, the Center is quite wrong in contending that "*[i]n addition to* asking whether the agency intended to preempt and whether the agency acted within the scope of its authority, the court *must always ask* whether displacement of state law is *required* under traditional preemption doctrine." Center Br. 27 (emphasis altered). Under *de la Cuesta*, that judgment is left to the agency's discretion – and the agency may elect to regulate preemptively even if traditional principles of implied conflict preemption would not "require" that outcome. Nor have federal administrative agencies become "runaway engines of preemption" (Center Br. 27) in the approximately 25 years since *de la Cuesta* was decided. This Court accordingly should reject petitioner's unfounded request to abandon the well-settled *de la Cuesta* framework notwithstanding the principle of *stare decisis*. Petitioner has not even come close to providing the requisite "special justification" for overruling this line of decisions. See *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984).

B. The OCC's Views Are Entitled To More Than *Skidmore* Deference Under This Court's Decisions

Petitioner and her *amici* further maintain that this Court should apply no deference – or at most, only *Skidmore* deference – to the OCC's determinations. Pet. Br. 31-38; AARP Br. 3-4, 13-18; Center Br. 8-21. These arguments are mistaken.

This Court's decision in *Medtronic* applied more than merely *Skidmore* deference to the FDA's interpretation of an express

preemption clause. At issue was the preemption provision of the Medical Device Amendments, 21 U.S.C. § 360k(a):

> [N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use *any requirement* –
>
> (1) which is different from, or in addition to, *any requirement* applicable under this chapter to the device, and
>
> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. § 360k(a) (emphasis added). The FDA had issued a regulation (21 C.F.R. § 808.1) interpreting Section 360k(a)'s references to "any requirement" as being limited to requirements that were "specific" in nature (or not of "general applicability"). See 518 U.S. at 498-500.

Writing for the Court, Justice Stevens explained that "our interpretation of the pre-emption statute is *substantially informed* by" the FDA's regulation and there is a "sound basis" for giving "*substantial weight* to the agency's view of the statute." 518 U.S. at 495-96 (emphasis added). The Court explained that, as the agency to which Congress "has delegated its authority to implement the provisions of the Act," the FDA was "uniquely qualified to determine whether a particular form of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress * * * and, therefore, whether it should be pre-empted." *Id.* at 496. In a concurring opinion, Justice Breyer also placed substantial weight on the FDA's interpretation of Section 360k(a). See *id.* at 505-06 (Breyer, J.) (it "makes sense" to infer that FDA "possesses a degree of leeway to determine which rules, regulations, or other administrative actions will have pre-emptive effect").

It is clear that the Court in *Medtronic* applied more than merely *Skidmore* deference. Under *Skidmore*, courts give due consideration to the agency's views and accord those views

more or less weight depending on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore*, 323 U.S. at 140. Yet this Court in *Medtronic* did not engage in that kind of analysis but rather pointed to the FDA's institutional role (an analysis more in keeping with *Chevron*).

Moreover, had this Court in *Medtronic* examined the *Skidmore* factors, it would have concluded that there were good reasons *not* to give any weight to the FDA's interpretation. As for the validity of the "specificity" gloss, this Court has rejected it in other preemption settings on the ground that it would create "an utterly irrational loophole." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992) (discussing preemption under the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1)); accord *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 47-48 (1987) (ERISA preemption); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244 & n.3 (1959) (NLRA preemption). As for the consistency of the FDA's views relating to the "specificity" gloss, it is significant that in *Medtronic*, the Solicitor General, representing the agency, filed an *amicus* brief effectively disavowing the FDA's "specificity" gloss and pointedly declining to urge the Court to give that interpretation any deference.[10] Had this Court been applying *Skidmore* deference, it surely would have counted the FDA's inconsistency as weighing against according any deference to the agency's "specificity" gloss.

Thus, acceptance of the argument of petitioner and her *amici* that only *Skidmore* deference (or something less) is

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[10] See Nos. 95-754, 95-886 U.S. Br. 24 n.19 (conceding that FDA's regulations concerning Good Manufacturing Practices, which are general in nature and apply to numerous types of devices, are federal "requirements" that trigger preemption under Section 360k(a)); *id.* at 18 (noting that the language of Section 360k(a) "suggests that * * * a [state] requirement *may be one of general applicability*") (emphasis added).

appropriate in this setting is inconsistent with *Medtronic* and would undermine the basis for that decision.

C. Petitioner's Arguments For An Exception To The *Chevron* Doctrine Are Unpersuasive

Finally, petitioner and her *amici* fare no better in their attempts to explain why the *Chevron* doctrine is categorically inapplicable to an administrative agency's interpretation of an express preemption clause or its determination that state law either conflicts with federal law or stands as an obstacle to the full accomplishment and execution of Congress's purposes.

Contrary to the suggestion of petitioner and her *amici*, not all issues of federal preemption present "questions of *constitutional* law." Center Br. 9 (emphasis added); see also Pet. Br. 32 (preemption is "a legal question within the expertise of courts"). As explained above, express preemption cases typically turn on Congress's intent and thus present ordinary issues of statutory interpretation. See pages 9-10, *supra*. So, too, do cases involving implied field preemption. See *id.* at 8. And cases involving implied *conflict* or *obstacle* preemption are at least "partly a matter of interpretation of federal statutory and regulatory law" (Center Br. 8) as well as state law. See page 8, *supra*. These are precisely the kinds of interpretive judgments that are routinely accorded *Chevron* deference outside the preemption setting.

Moreover, as this Court recognized in *Medtronic*, a federal agency may be "uniquely qualified to determine whether a particular form of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 518 U.S. at 496 (internal quotations omitted). Often this determination requires an understanding not only of how a complex regulatory scheme works and affects the real-world conduct of regulated parties but also of how the imposition of diverse state and local requirements affects that scheme and those regulated parties. See note 2, *supra*. It may also involve an identification of Congress's various purposes (which may be in tension with each other) and an assessment of the

likely impact of state and local regulations on those purposes. Thus, while the doctrine of conflict preemption is rooted in the Supremacy Clause, the agency's interpretations in these settings are little different from other interpretations that draw on the agency's expertise and specialized knowledge and to which *Chevron* deference is accorded.

Furthermore, the Center's arguments on this score incorrectly assume that an administrative agency may decide to preempt state and local law only after determining whether "any resulting tension between federal law and state law [is] sufficiently great to *require* the displacement of the state law by the federal law." Center Br. 2 (emphasis added). But an agency delegated rulemaking authority by Congress is not required to determine that implied conflict preemption exists under the Supremacy Clause before deciding to regulate preemptively. Agencies, just like Congress, may elect to preempt state law that is *entirely consistent with* – indeed, that mirrors – federal law. See, *e.g.*, Airline Deregulation Act, 49 U.S.C. § 41713 (preempting all state laws that "relate[] to a price, route, or service of an air carrier"); ERISA, 29 U.S.C. § 1144(a) (with certain exceptions, preempting state laws that "relate to any employee benefit plan"). And agencies, like Congress, can use preemption to ensure that an entire area is completely unregulated by state and federal regulations – even if state and local governments have yet to legislate in the area. See *Arkansas Electric Coop. Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate.") (emphasis in original). The Center's suggestion that agencies do exactly the same thing as judges in implied conflict preemption cases is thus mistaken.

Equally incorrect is the argument that *Chevron* deference is unwarranted because courts have developed the law concerning express and implied preemption. Pet. Br. 32; Center Br. 9-11. As just explained, agency judgments about the meaning of

express preemption clauses turn on Congress's intent; they do not necessarily depend on the scope of the various doctrines of implied preemption or other concepts that *courts* apply in adjudicating preemption issues. Moreover, this argument proves too much. Courts have developed a variety of textual, referential, and substantive canons of statutory construction. See note 3, *supra*. Like the "presumption against preemption," these canons often are used by agencies in interpreting statutory ambiguities. But the mere fact that agencies use these court-developed rules of statutory construction hardly means that their interpretive efforts thereby fall outside of the proper reach of the *Chevron* doctrine.

Nor is it correct that *Chevron* is categorically inapplicable because "preemptive regulations of the sort at issue here have the direct and intended effect of expanding the agency's own jurisdiction." Pet. Br. 32; see also Center Br. 12-15. The agency's jurisdiction remains the same whether it elects to regulate concurrently with state and local governments or to regulate preemptively. Put differently, the decision to regulate preemptively does not "expand" the agency's jurisdiction to new objects of regulation; it merely assures that subordinate government actors will not *also* act within that jurisdiction.

It is true that agency decisions concerning preemption "affect the federal-State balance" (Pet. Br. 33; see also Center Br. 11-12), but as explained above preemption is an ordinary feature of our scheme of government and not a threat to "federalism." *Every* federal regulation "affects the federal-State balance" because, under the Supremacy Clause, it limits the power of state and local governments to take conflicting action. In any event, Congress has often taken steps – as it did in the federal banking laws at issue here – to accommodate the interests of state and local governments. In sum, petitioner and her *amici* provide no sound reason to create a wholesale exception to the *Chevron* doctrine.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

LINDA A. WATTERS,
Petitioner,

v.

WACHOVIA BANK, N.A. and
WACHOVIA MORTGAGE CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE CENTER FOR STATE ENFORCEMENT OF ANTITRUST AND CONSUMER PROTECTION LAWS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether administrative agency determinations of pre-emption are entitled to *Chevron* deference.

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INTEREST OF *AMICUS CURIAE*[1]

The Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. is a nonprofit public interest and research organization. Its mission is to enhance consumer welfare by supporting the fair, effective, and uniform enforcement of antitrust and consumer protection laws at the state level. The Center is concerned that an aggressive program of preemption of state banking laws by the Office of Comptroller of the Currency will result in inadequate protection of consumers against predatory lending practices and other abuses by firms that originate home loans and refinancings. Firms that originate loans through state-chartered corporations, including wholly-owned subsidiaries of national banks, have traditionally been subject to regulation by State Attorneys General and state banking authorities. If state regulation of such entities is preempted, a significant source of experienced personnel and resources will no longer be available to police against abuses of unsophisticated debtors that appear to be occurring with increasing frequency in the home lending market.

SUMMARY OF ARGUMENT

The role of administrative agencies in resolving preemption questions has been a matter of considerable uncertainty both for this Court and the lower federal courts. There is no doubt that Congress can delegate authority to agencies to act with the force of law, and when they exercise this authority, that their regulations can preempt state law in certain circumstances. It does not follow, however, that agencies—at least absent a very clear delegation of authority from Congress—have authority to issue binding declarations

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[1] Counsel for the parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, made a monetary contribution to the brief's preparation or submission.

that state law has been preempted. Federal agencies should, of course, be respectfully heard on the question of preemption. But the ultimate determination to displace state law through preemption entails a complex judgment about "the federal-state balance embodied in our Supremacy Clause jurisprudence." *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 717 (1985). Ideally that balance will be struck by Congress, where the interests of both the federal government and the States are represented. Congress, however, cannot anticipate in advance all possible sources of tension between federal and state law. When unforeseen tensions arise, the decision to displace state law is one that should be made primarily by courts applying judicially-developed principles of preemption, not by agencies in the exercise of normal delegated power to administer particular statutory schemes.

Preemption controversies typically entail two questions, which are interwoven but analytically distinct. The first is the question of interpretation: What does the federal statute or regulation at issue mean? The second is the question of displacement: Given what the federal law means, is any resulting tension between federal law and state law sufficiently great to require the displacement of the state law by federal law, rendering the latter the exclusive source of legal authority?

The first question involves an exercise in statutory and regulatory construction, where it makes sense to draw upon the expertise of federal agencies. Agencies charged with the administration of statutes often have a better understanding of the nuances of a regulatory regime than do courts. And insofar as the resolution of ambiguities in statutes and regulations entails making policy judgments, agencies are more accountable policymakers than courts.

The second question—whether displacement of state law is required—entails a judgment about the degree of tension

between federal and state law, and whether this tension requires displacing state law with a regime of exclusive federal regulation. In answering this question, agencies should not be given the strong deference associated with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The question is constitutional in nature, grounded in the Supremacy Clause; it is governed by judicially-created doctrine as to which agencies can claim no particular insight; it has systemic implications for the balance of authority between the federal government and the States, as to which agencies can claim no disinterested expertise; and it involves policing the boundaries of agency authority, a function that Congress has generally assigned to courts rather than to agencies themselves.

For all these reasons, courts should review agency views about displacement of state law under the standard set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), not *Chevron*. *Skidmore* directs courts to consider a variety of contextual factors that bear on the persuasiveness of an agency interpretation, leaving the ultimate resolution of the question for the judiciary. This Court's decisions regarding the role of agencies in resolving preemption questions, on the whole, are far more consistent with the standard of review prescribed in *Skidmore* than *Chevron*. The congruence between this Court's judgments and the *Skidmore* standard confirms the wisdom of applying a standard of persuasion, rather than compulsory deference, in this area.

ARGUMENT

Under the National Bank Act, nationally-chartered banks are expressly exempt from visitation by state authorities. *See* 12 U.S.C. § 484(a) (2000). By regulation, the Office of Comptroller of the Currency (OCC or Comptroller) has declared that state-chartered operating subsidiaries of national banks are entitled to same degree of preemption of state visitation afforded to national banks themselves. *See* 12

C.F.R. § 7.4006. In so ruling, the OCC has vastly expanded the scope of preemption of state law and regulation previously recognized to exist with regard to banking institutions. The Court of Appeals upheld this expansive interpretation of the preemptive scope of the National Bank Act by applying the standard of review of agency interpretations of ambiguous statutes set forth in *Chevron U.S.A. Inc. v. National Resources Defence Council, Inc.*, 467 U.S. 837 (1984). Because the court reached its decision to preempt by applying an erroneous standard of review, the decision below should be reversed.

I. AGENCY POWER TO DETERMINE THE MEANING OF A STATUTE DIFFERS FROM ITS POWER TO DETERMINE THE STATUTE'S PREEMPTIVE SCOPE

The President has limited power to make law on his own authority. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). The many administrative bodies that populate the executive branch, which are wholly creatures of statute, have even fewer inherent lawmaking powers. With rare exceptions, administrative agencies can act with the force of law only if this authority has been delegated to them by Congress. *La. Pub. Serv. Comm'n FCC*, 476 U.S. 355, 374 (1986); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

In order for an agency to act with the force of law, two minimal conditions must always be met. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *see also Gonzales v. Oregon*, 126 S. Ct. 904, 914-15 (2006); *Nat'l Cable & Telecomm. Assn. v. Brand X Internet Serv.*, 125 S.Ct. 2688, 2699 (2005). First, Congress, exercising one of its enumerated powers, must clearly delegate authority to the agency to act with the force of law. Second, the agency must intend to exercise these delegated powers by taking action having the force of law. *See, e.g., Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 707 F.2d 548, 558 (D.C. Cir. 1983)

("A rule can be legislative only if Congress has delegated legislative power to the agency and if the agency intended to use that power in promulgating the rule at issue.").

When the prescribed conditions for acting with the force of law are met, the resulting agency-generated law has the full force and effect of a federal statute. This means the rule is binding on all who come within its terms, including not just the regulated community but also the agency itself, as well as the Congress, the President, and the courts. *See, e.g., Nixon v. United States*, 418 U.S. 683, 696 (1974) ("So long as this [legislative] regulation remains in force the Executive Branch is bound by it, and indeed the United States as sovereign composed of the three branches is bound to respect and enforce it."). It also means that agency rules with the force of law partake of the status of "Laws of the United States," and hence are "the supreme Law of the Land." *See* U.S. Const. Art. VI, § 2; *City of New York v. FCC*, 486 U.S. 57, 63 (1988) ("The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.").

Accordingly, it has long been recognized that agency rules having the force of law can preempt state law. The modern era of administrative preemption appears to date from *United States v. Shimer*, 367 U.S. 374 (1960). Following *Shimer*, this Court has held on many occasions that agency regulations having the force of law can supply the basis for a determination that state law is preempted. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (holding that a regulation mandating phase-in of passive restraints in automobiles impliedly preempts state tort law claim predicated on the proposition that installation of air bags was mandatory); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (holding that a federal regulation governing maximum train speed preempts a negligence claim that a speed under the federal maximum was excessive).

Whether agencies have authority to issue binding *declarations* of preemption entitled to *Chevron* deference, however, is quite another matter. Preemption is often characterized as an exercise in statutory interpretation, or as resting entirely on congressional intent. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). But a finding of preemption actually requires answering two interrelated questions. First, there is the question of interpretation: What does the federal statute or regulation at issue mean? Second, there is the question of displacement: Is federal law, as interpreted, in tension with state law, and is this tension sufficiently severe to require the displacement of state law in whole or in part in order to achieve the purposes of federal law? Resolution of the first question does not always—or even usually—answer the second.

Sometimes, of course, Congress expressly determines by legislation that certain state laws are preempted. *See, e.g., Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) (construing scope of ERISA's express preemption clause). But "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000). Accordingly, this Court has held state law preempted without regard to whether an express preemption clause is satisfied, *Buckman v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2000), and has held state law preempted without regard to whether the statute contains an express saving clause, *Geier v. Am. Honda Motor Co.*, *supra*, 529 U.S. at 869.

Both agencies and courts are competent to interpret federal statutes. Agencies engage in statutory and regulatory interpretation all the time, in the ordinary course of discharging their delegated functions. Indeed, this Court has repeatedly

recognized that agencies are preferred interpreters of statutes in certain circumstances.

The question of displacement, however, presents additional factors not present in resolving relatively straightforward questions of interpretation. Ideally, the question of displacement should be resolved by Congress. Congress is the primary lawmaking institution under the Constitution, and it was undoubtedly congressional legislation that the Framers had in mind when they provided in Article VI, § 2 that the "Laws of the United States" would be the "supreme Law of the Land." Congress has the best claim to represent the interests of both the federal government and the States. And Congress has broad powers of investigation, which allows it to gather the relevant facts necessary to determine whether the tension between federal law and state law requires that the latter give way to the exclusion of the former.

But Congress is severely hampered in resolving preemption controversies by the fact that legislation ordinarily operates prospectively. The limits of human knowledge make it virtually impossible for Congress to anticipate all relevant issues before they arise. Congress would have to analyze the common law and statutory rules of fifty different States, including not just those in existence at the time the federal legislation was enacted, but those that might be passed in the future. *See* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 Sup. Ct. Rev. 343, 376-77. This is clearly beyond the capacity of even the most far-sighted legislative body.

Given the limits of human knowledge, Congress cannot be expected to resolve all preemption questions through express preemption and savings clauses. Consequently, it is necessary to identify an institution that can resolve these questions only after many of the sources of tension between federal and state law are fully identified. The two obvious candidates for

undertaking such ex post inquiries are courts and the agencies charged with administration of federal statutes.

II. WHY COURTS, NOT AGENCIES, SHOULD DETERMINE WHETHER TO DISPLACE STATE LAW

Agencies might be thought to have an advantage in determining whether to displace state law insofar as this entails a judgment about the requirements of individual federal regulatory schemes, with which agencies have intimate familiarity. *See Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 455 (2005) (Breyer, J., concurring). But the decision to displace state law also implicates the consideration of a wide range of systemic variables as to which the judiciary has a superior claim, not only to competence, but also to authority under our constitutional order. The decision to displace state law presents a variety of concerns that point toward the need for a general jurisprudence of preemption which can be developed and applied in a uniform fashion. Only the courts, and in particular this Court—which has the ability to review questions of preemption that arise both from federal and state courts—can perform the function of determining preemption questions in a manner that maintains a unified jurisprudence of preemption sensitive to the many systemic values at stake.

A. Displacement Presents a Question of Constitutional Law

Deciding whether the effectuation of federal law requires displacement of state law is, as previously noted, partly a matter of interpretation of federal statutory and regulatory law. But it is also a constitutional decision, having "its roots in the Supremacy Clause." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982). Indeed, from the perspective of the States, there is little difference between a judgment that state law is unconstitutional, and a judgment that state law is pre-empted. Both types of judgments nullify

otherwise duly enacted state statutes and common law rules of decision. In so doing, both type judgments subtract from the power the States otherwise enjoy as sovereign entities. Both types of claims can give rise to federal jurisdiction under 28 U.S.C. § 1331, and in some circumstances can be redressed under the federal cause of action created in 42 U.S.C. § 1983. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107-08 (1989).

Part of our received tradition is the understanding that the judiciary has unique competence to resolve questions of constitutional law. *Marbury v. Madison,* 5 U.S. (1 Cranch.) 137 (1803). Thus, when agency decisions raise questions of constitutional law, courts uniformly decline to defer to agency interpretations of constitutional meaning. *See, e.g., Public Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1998) ("the federal Judiciary does not . . . owe deference to the Executive Branch's interpretation of the Constitution."). Indeed, this Court has refused to defer to agency views when they raise constitutional questions that otherwise can be avoided. *See, e.g., Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2000); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Because the power to displace state law through preemption likewise rests on a provision of the Constitution—the Supremacy Clause—and because from the States' perspective a judgment of preemption is tantamount to a finding of unconstitutionality, it is equally anomalous to say that federal courts must defer to reasonable agency determinations of preemption.

B. Displacement Entails the Application of Law Developed by Courts

Given its origins in the Supremacy Clause, it is not surprising that the legal doctrine governing the decision to displace state law through preemption has been developed exclusively by courts and in particular by this Court. Thus,

the Court has distinguished between express and implied preemption. *See Cipollone*, 505 U.S. at 517. It has developed multiple categories of implied preemption, including conflict, impossibility, frustration of purpose, and occupation of a field. *See, e.g., Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996). And it has identified and enforced a presumption against preemption, when federal regulation involves matters that have been traditionally subject to state police powers. *See Medtronic*, 517 U.S. at 495; *Hillsborough Cty.*, 471 U.S. at 715, 718. This doctrine is transsubstantive, in the sense that it applies across all fields of regulation.

Administrative agencies have played no role in the development of preemption doctrine. The OCC, in its preemption decisions has recognized this fact. In the Federal Register notice accompanying the promulgation of 12 C.F.R. § 7.40006, the OCC noted that the rule "reflects the conclusion we believe a Federal court would reach, even in the absence of the regulation, pursuant to the Supremacy Clause and applicable judicial precedent." *Investment Securities; Bank Activities; Leasing*, 66 Fed. Reg. 34,784, 34,790 (July 2, 2001).

Similarly, in determining a preemption question closely related to the one presented here—whether state predatory lending statutes are preempted—the OCC has relied primarily on its understanding that the presumption against preemption does not apply in determining the scope of the powers of nationally chartered banks, a proposition it has attributed to this Court's decision in *Barnett Bank, supra. See Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904, 1910 (Jan. 13, 2004). Whether this reading of *Barnett Bank* is correct is doubtful. *See* Nicholas Bagley, Note, *The Unwarranted Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274 (2004). Correct or not, however, the point is that the OCC has justified important preemption decisions largely in terms of its reading of judicial opinions, a source of authority that the OCC has no

special insights in interpreting, and which the judiciary is presumably in a better position to explicate.

C. Displacement Implicates Considerations of Federalism

The decision to displace state law also implicates sensitive questions of federalism. Thus, for example, this Court has described preemption of state common law remedies as a "serious intrusion into state sovereignty." *Medtronic*, 518 U.S. at 488. The decision to displace state law should be informed by an understanding of which areas of regulation have been delegated to the federal government, which have been traditionally been committed to the States, and when constitutional sensitivities would be irritated either by a determination of concurrent authority or of exclusive federal competence.

Agencies are specialized institutions, intensely focused on the details of the particular statutory regimes they are charged with administering. By design and tradition, they are not expected to ponder larger structural issues such as the relative balance of authority between the federal and state governments, the importance of preserving state autonomy, the value of allowing policy to vary in accordance with local conditions, or the systemic advantages of permitting state experimentation with divergent approaches to social problems. *See Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991) (summarizing the systemic benefits of federalism).

Presidents in recent years have sought to re-direct the tendencies of agencies to overlook federalism values. *See* Executive Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999); Executive Order No. 12,988, 61 Fed. Reg. 4,731 (Feb. 7, 1996). Yet even in the face of these executive orders, agencies rarely consider the federalism implications of their actions. One commentator reports:

> The rate of federalism impact statements . . . appears quite low. In 1999, the General Accounting Office

> reported that only five federalism impact assessments had been prepared for the over 11,000 final rules agencies issued between April 1996 and December 1998. A sampling of 600 proposed and final rules during one quarter in 2003 revealed six federalism impact statements prepared by agencies.

Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737, 783 (2004).

The same author reports that, of the few cases in which federalism impact statements were prepared, "the quality of the analysis . . . suggests that agencies are not especially sensitive to federalism-type values." *Id.* at 784. Specifically, of the five impact analyses reviewed in 2003 that concerned preemption, each justified the preemption of state law "primarily or solely in terms of the agency's statutory authority to do so." *Id.* That is, each analysis ended abruptly following the agency's claim of statutory authority to preempt state law, without any analysis of competing interests such as the preservation of state sovereignty.

The point, of course, is not that agencies have nothing of value to contribute to determinations about when and to what extent to displace state law. Clearly they do. Rather, the point is that agencies have no background or incentives to consider in a systematic fashion the impact of preemption decisions on larger structural issues about the balance of power between the federal government and the States. In the absence of an express directive from Congress, judges, who are generalists and who have a more diverse background in state and local government, are better situated to make these judgments.

D. Displacement Implicates the Scope of Agency Power

Determining whether federal law ousts state law also implicates the scope of agency authority. In *Louisiana Pub. Serv. Comm'n*, *supra*, this Court was confronted with a chal-

lenge to legislative regulations issued by the Federal Communications Commission that mandated a uniform system of depreciation accounting by both state and federal regulators. The FCC stated unequivocally its intent to preempt contrary state depreciation rules. 476 U.S. at 362-63. This Court, however, held that the FCC rules did not preempt state law because this would violate a statutory provision denying the agency any authority to set rates and charges for intrastate telecommunications service. As the Court observed: "An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency the power to override Congress. This we are both unwilling and unable to do." *Id.* at 374-75.

There are a variety of reasons why agencies are not the best monitors of the scope of their own authority. Agencies may at times engage in empire-building, or may resent the implicit competition from other sources of regulatory authority like States. Analysts have long observed that agencies, particularly ones devoted to regulation of a single industry, can become too closely identified with the interests of the industry they are supposed to regulate. *See generally* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Colum. L Rev. 1 (1998) (providing an overview of empirical studies). At least one court has perceived that this phenomenon may apply to the OCC:

> [T]he constituency positively affected by the OCC's position is concentrated, organized and well-funded, and also happens to be the regulated industry. In contrast, the constituency which is adversely affected by the decision, though vast, is diffuse, unorganized, and definitionally ill-funded.

Wells Fargo Bank of Texas NA v. James, 321 F.3d 488, 494 (5th Cir. 2003). Whether or not this particular characterization is accurate, it underscores the potential pitfalls in

supposing that agencies can be the judge of the scope of their own authority.

Congress has provided for judicial review of agency action in significant part to assure that agencies stay within the bounds of their delegated authority. This Court has been reluctant to carve out any general exception from *Chevron* for agency interpretations that transgress the bounds of agency authority, presumably because of the difficulty of distinguishing between "jurisdictional" and "non-jurisdictional" decisions. *Compare Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in judgment) *with id.* at 386-87 (Brennan, J., dissenting). Exactly how *Chevron* should be reconciled with the traditional judicial role in policing the boundaries of agency authority remains to be fully worked out. Part of the solution may lie in more closely scrutinizing congressional intent at step one of *Chevron* when agencies move to fill "extraordinary" gaps in their statutory authority. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Part of the solution may also lie in more closely examining the scope of an agency's delegated authority in determining at "step zero" whether the preconditions for *Chevron* deference are met. *See Gonzales v. Oregon*, 126 S.Ct. 904, 916-22 (2006); *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 209-10 (2006); Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L. J. 833, 873-89, 910-14 (2001).

There is no need in this case, however, to tackle this more general problem. Questions about whether state law should be preempted by federal law are not handicapped by any definitional conundrum similar to the one presented by determining when an agency has acted outside its "jurisdiction." The question whether federal law requires the displacement of state law is discrete and readily differentiated from other issues of interpretation. *See* Mendelson, *supra*, at

796 ("Preemption questions are relatively easy to distinguish, ex ante, from other categories of interpretative questions, so withdrawing deference on preemption issues would not introduce significant new uncertainty-based costs . . . ."). Consequently, the decision to preempt can be subject to a more demanding standard of review, allowing courts to police the boundaries of agency authority—along this dimension at least—without calling into question the general principle of deference established by *Chevron*.

III. AGENCY VIEWS ABOUT PREEMPTION SHOULD RECEIVE *SKIDMORE* DEFERENCE, NOT *CHEVRON* DEFERENCE

The forgoing considerations suggest that the proper standard for reviewing agency determinations of preemption is not the one set forth in *Chevron*, but rather the older yet enduring standard articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

A. *Chevron* and *Skidmore*

This Court has identified two standards of review for evaluating agency interpretations of statutes: the *Chevron* standard and the *Skidmore* standard. *See generally Mead*, 533 U.S. at 227-28, 234-35. The two standards rest on different rationales for affording deference to agency interpretations of ambiguous statutes. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); *see Chevron*, 467 U.S. at 843-44 (deference rests on either express or implied delegation of power to agency). This delegation, in turn, creates a presumption that Congress intended the agency, rather than the courts, to exercise primary interpretational authority under the statute. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) (*Chevron* rests on the "presumption" that

Congress meant for the agency to "possess whatever degree of discretion" statutory ambiguity allows).

Under *Skidmore*, in contrast, no particular delegation of power to the agency is required before it is entitled to deference. 323 U.S. at 137. Deference under *Skidmore* is grounded not on delegated power but rather on the desirability of drawing upon the "specialized experience and broader investigations and information" available to the agency, *id.* at 139, and on the need to preserve uniformity between administrative and judicial understandings of the requirements of a national program. *Id.* at 140.

Given this critical difference in the legal underpinnings of *Chevron* and *Skidmore*, the standards with which they are associated impose different degrees of constraint on the courts. *Chevron* deference, when it applies, is mandatory, in the sense that a court must accept any agency interpretation that is consistent with the statute and is otherwise "permissible" or "reasonable." 467 U.S. at 844 (reasonable agency interpretation is given "controlling weight"). *Skidmore* deference, in contrast, rests in the sound discretion of the court. "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140. As the Court put it in *Mead*, an agency opinion evaluated under *Skidmore* receives the degree of deference appropriate to "the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." 533 U.S. at 235.

B. *Skidmore* Supplies the Standard for Reviewing Preemption Determinations

Skidmore strikes the right balance between the competing considerations presented by preemption controversies, entail-

ing, as they do, the need both to determine the meaning of federal law and to decide whether federal law requires displacement of state law. *Skidmore* instructs courts to give careful consideration to agency views, grounded in experience, about the impact of divergent state laws on the implementation of federal programs. Yet it requires courts to follow these views only to the extent they are persuasive, thereby preserving judicial authority to maintain a uniform jurisprudence of preemption that is sensitive to the systemic variables discussed in Part II that make courts the preferred institution for making the final determination whether to displace state law.

Moreover, the logic of *Chevron* itself requires in most cases that courts apply the *Skidmore* standard rather than *Chevron* to issues about preemption of state law. *Chevron* is grounded in a delegation of authority from Congress to an agency to determine certain unresolved questions of federal law. If Congress has not delegated authority to an agency to make binding determinations of preemption, or if an agency has been given such authority but does not invoke that authority in offering its view about the preemptive effect of federal law, then the preconditions for *Chevron* deference have not been established. The Court recently recognized this point in the specific context of preemption in *Gonzales v. Oregon*, 126 S. Ct. 904 (2006). The Court observed there that a delegation of authority to an agency to promulgate standards for regulated entities to follow does not entail "the authority to decide the preemptive scope of the federal statute" unless a *separate delegation* of such authority is evident in the statute. *Id.* at 919, citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990).

Here, there is no indication that Congress has delegated authority to the OCC to make binding determinations of preemption. The Court of Appeals cited 12 U.S.C. § 93a (2000), *see* Pet. App. 5a, which gives the Comptroller

authority "to prescribe rules and regulations to carry out the responsibilities of the office." This provision does not unambiguously confer authority on the OCC to issue legislative regulations, the only type that can be said to have preemptive effect. *Cf. Chrysler Corp.*, 441 U.S. at 310 (holding that 5 U.S.C. § 301, which confers authority on the head of an executive department to prescribe regulations for the "government of his department," does not confer authority to make legislative rules). Even assuming § 93a authorizes legislative rules, however, it does not authorize legislative rules that *preempt state law*. The power to displace state law or to declare state law preempted is not mentioned, either explicitly or by clear implication. If § 93a suffices to delegate authority to agencies to make binding determinations of preemption, then every federal administrative agency with a general grant of authority to make rules and regulations would be empowered to make binding determinations of preemption.

Nor does 12 U.S.C. § 43 (2000), requiring that federal banking agencies follow specific procedures "[b]efore issuing any opinion letter or interpretative rule" dealing with preemption, constitute a grant of such authority. Section 43 nowhere confers any authority on any agency to make preemption decisions. Rather, it imposes a *limitation* on any pre-existing agency authority with regard to preemption, requiring procedures beyond those set forth in the Administrative Procedure Act for issuing opinion letters or interpretative rules. *See* 5 U.S.C. § 553(b) (2000) (exempting interpretative rules and general statements of policy from notice and comment requirements). This is confirmed by the Conference Report, which states that the new procedures are "not intended to confer upon the agency any new authority to preempt or to determine preemptive Congressional intent . . . or to change the substantive theories of pre-emption, as set forth in existing law." H.R. Rep. No. 103-651, at 55, *as reprinted in* 1994 U.S.C.C.A.N. 2068, 2076.

If anything, § 43 appears to confirm congressional understanding that any agency view about preemption will be advisory only. "Opinion letters" and "interpretative rules" are nonbinding forms of agency action, offering only advice to the regulated community about an agency's understanding of the law's requirements. *See, e.g.*, 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4 (4th ed. 2002). They do not have the force of law, and hence are not eligible for *Chevron* deference. *See Mead*, 533 U.S. at 234; *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Congress occasionally delegates authority to agencies to make determinations of preemption that have the force of law. But when it does so, it conveys such authority in unmistakable language.[2] Section 43 falls well short of such an unambiguous grant.

C. All Predicate Legal Determinations Must be Assessed Under *Skidmore*

A final and critical point is relevant here. When an agency seeks judicial deference for its judgment that preemption is required, courts must review not just the agency's final conclusion that preemption is required, but *all* agency interpretations of federal law that serve as a predicate to that determination, under the *Skidmore* standard. As previously noted, preemption decisions entail two interrelated inquiries: determining the meaning of federal law and whether any tension between federal and state law requires displacement of state law. If the agency seeks deference for its interpreta-

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[2] *See* 30 U.S.C. § 1254(g) (2000) (authorizing Secretary of Interior to identify state laws and regulations preempted by the Surface Mining Control and Reclamation Act); 47 U.S.C § 253(d) (authorizing FCC to "preempt the enforcement of" state and local statutes, regulations, or legal requirements interfering with development of competitive telecommunications services); 49 U.S.C. § 5125(d) (authorizing Secretary of Transportation to determine whether particular state, local or tribal requirements respecting the transportation of hazardous materials are preempted).

tion of federal law and no issue about displacement of state law is presented, then there is no reason why *Chevron* should not supply the relevant standard (provided the other preconditions for *Chevron* deference are met). *See Smiley v. Citibank (South Dakota), supra.* But if the agency asks the court to defer to its judgment that displacement is required, all steps in the chain of logic that lead to this conclusion should be reviewed under *Skidmore*. Any other approach would lead to easy evasion of the limits on agency authority to preempt.

In this case, for example, the OCC has asserted three different pathways to preemption. One pathway relies on 12 C.F.R. § 7.4006, which provides that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." Here the OCC's regulation makes express reference to the application of state law, and thus the regulation can be readily identified as embodying the conclusion that preemption is required.

But the OCC has also argued that preemption follows from 12 C.F.R. § 5.34(e)(3), which provides that an operating subsidiary engages in activities "pursuant to the same authorization, terms and conditions that apply to the conduct of such activity by its parent national bank." Here, there is no explicit reference to the application of state law, so on its face the regulation does not appear to pre-empt state law. In litigation, however, the OCC has claimed that the effect of this regulation is exactly the same as § 7.4006: By equating operating subsidiaries with the parent national bank, the regulation compels the conclusion that operating subsidiaries, like the parent bank, are exempt from state visitation requirements.

Similarly, the OCC has argued that preemption follows from 12 C.F.R. § 34.4(a)(1), which provides that "a national bank may make real estate loans . . . without regard to state law" requirements for "licensing" and "registration," in com-

bination with 12 C.F.R. § 34.1(b), which provides that "[t]his part applies to national banks and their operating subsidiaries as provided in 12 CFR 5.34." Again, by equating operating subsidiaries with national banks, the rule in effect mandates that operating subsidiaries enjoy the same preemption status as national banks.

Whichever pathway is chosen, the OCC is claiming authority to preempt regulation of state-chartered operating subsidiaries on the same basis as Congress has preempted regulation of nationally-chartered banks. This conclusion, however reached, implicates fundamental questions about the allocation of regulatory authority between the federal government and the States, and hence should be reviewed under the *Skidmore* standard, not *Chevron*.

IV. THIS COURT'S POST-*CHEVRON* DECISIONS ADDRESSING AGENCY VIEWS ABOUT PREEMPTION SUPPORT THE *SKIDMORE* STANDARD

One can mine this Court's post-*Chevron* decisions for a variety of propositions about the role of administrative agencies in determining questions of preemption. There are statements which appear to pre-suppose that courts should give strong deference to agencies' views about preemption, *see City of New York v. FCC*, 486 U.S. at 64; statements that appear to contemplate an intermediate degree of deference to agency views, *see Geier*, 529 U.S. at 883; and state-ments that suggest the question of preemption should be decided *de novo*, without giving any weight to agency views, *see Louisiana Pub. Serv. Comm'n*, *supra*. Considered as a whole, however, the multiple pronouncements on this subject by the Court and individual Justices are most consistent with the *Skidmore* standard of review.

Of particular relevance in the present case, the Court has never suggested that *Chevron* deference is appropriate in

determining the preemptive scope of the National Bank Act. The Court has on occasion granted *Chevron* deference to decisions of the OCC interpreting the National Bank Act. But in none of these cases did the Court give *Chevron* deference on a question of preemption. *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), is particularly instructive in this regard. The question was whether a national bank could charge a credit-card holder a late-payment fee that was lawful in the bank's home State but prohibited in the cardholder's State. The bank contended that state restrictions on late-payment fees were preempted by § 85, which authorizes a national bank to charge "interest at the rate allowed by the laws of the State . . . where the bank is lo cated." 12 U.S.C. § 85. In a unanimous decision, this Court applied *Chevron* and upheld the Comptroller's regulation determining that "interest" within the meaning of § 85 includes late payments fees. In so ruling, however, the Court made very clear that it was *not* resolving, and certainly was not giving *Chevron* deference to, any question of preemption:

> [Petitioner] argues that the "presumption against . . . pre-emption". . .in effect trumps *Chevron*, and requires a court to make its own interpretation of § 85 that will avoid (to the extent possible) pre-emption of state law. This argument confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question *whether* a statute is pre-emptive. We may assume (without deciding) that the latter question must always be decided *de novo* by the courts. That is not the question at issue here; there is no doubt that § 85 pre-empts state law.

517 U.S. at 743-44 (second ellipsis added). *Smiley* thus unequivocally reserved, without deciding, the question presented in this case.

Similarly, in *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995), the Court gave *Chevron* deference to an interpretation of the

National Bank Act adopted by the Comptroller. But the issue in question—whether annuities are "insurance" within the meaning of § 92 of the Act—did not present any question of preemption. Likewise, in *Clark v. Securities Industry Assn.*, 479 U.S. 388 (1987), the Court deferred to the OCC's determination that national banks can establish affiliates to offer discount brokerage services without offending the branch banking limitations of the Act, citing *Chevron* among other decisions. *Id.* at 404. Again, no issue of preemption was presented.[3]

Several post-*Chevron* decisions outside the banking context have given more extensive consideration to the relevance of agency views about preemption. The Court's discussion of the question in *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2001), is entirely consistent with *Skidmore*. The Court there concluded that it would give "some weight" to the agency's interpretation of its regulation as impliedly preempting state tort liability. *Id.* at 883. The Court noted:

> Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is "uniquely qualified" to comprehend the likely impact of state requirements. And DOT has explained FMVSS 208's objectives, and the interference that "no airbag" suits pose thereto, consistently over time.

Id. (citations omitted). In light of the cited factors, which are virtually a paraphrase of *Skidmore*, the Court concluded that "the agency's own views should make a difference." *Id.* The dissenting opinion in *Geier* stated that the agency's view "'do[es] not warrant *Chevron*-style deference.'" *See id.* at

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[3] A recent preemption decision arising under the banking acts, *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), involved no issue of deference to agency interpretation.

911-12 (Stevens, J., dissenting). It added that even "the lesser deference paid to it by the Court today" was "inappropriate," unless the States had been given an opportunity to participate. *Id.* Thus, the dissent recognized that the majority had applied a standard of review less deferential than *Chevron*.

A similar conclusion follows from the discussion of agency views about preemption in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). The Medical Device Amendments include a provision expressly preempting any "requirement" different from federal ones applicable to medical devices, and the question was whether this preempted certain state tort claims. The Court independently interpreted the ambiguities in the statute, in particular, uncertainty about the meaning of "requirement." 518 U.S. at 486-91 (plurality opinion). Only after this extensive consideration of the interpretative issues did the Court turn to the FDA's views. The Court cited a number of factors that caused it to give those views "substantial weight," including FDA's general familiarity with the requirements of the Act, the process the FDA had instituted for offering "advisory opinions" to interested parties about whether particular state requirements are preempted, and Congress's specific delegation to the agency of authority to exempt state requirements from preemption. *Id.* at 496. Although the Court cited *Chevron* for the proposition that delegation of authority from Congress to an agency is a reason for deferring to agency interpretations, *id.*, there is no suggestion in the opinion that the Court was applying *Chevron*'s two step framework, or that it regarded the agency's views as controlling as long as they were reasonable. Instead, the Court said only that its independent conclusion was "substantially informed" by the FDA's view about preemption. *Id.* at 495.

This reading of *Medtronic* is confirmed by an exchange between the majority opinion and the opinion of Justice O'Connor dissenting in part. Justice O'Connor wrote that the majority had offered no "sound basis" for deferring to FDA's

view about preemption. *Id.* at 509. Later in her opinion, she observed: "Apparently recognizing that *Chevron* deference is unwarranted here, the Court does not admit to deferring to these regulations, but merely permits them to 'infor[m]' the Court's interpretation." *Id* at 512. She added: "It is not certain that an agency regulation determining the preemptive effect of *any* federal statutes is entitled to deference. . . ." *Id.* Tellingly, the majority responded only to the first remark, noting that the contextual factors it enumerated did provide a "sound basis" for giving weight to FDA's views. *Id.* at 496. But the majority did not deny Justice O'Connor's conclusion that "*Chevron* deference is unwarranted here," nor did it challenge her expression of doubt as to whether deference to agency views is ever appropriate on the question of preemption.

Likewise, in *Lawrence County v. Lead-Deadwood School District No. 40-1*, 469 U.S. 256, 262 (1985), the Court said it would give "substantial deference" to an Interior Department interpretation of a federal statute governing the distribution of federal funds to counties entitled to receive in-lieu payments because they contained large tracts of federal land. But the Court decided *de novo* the question whether this statute displaced state law requiring that payments be allocating the same way general state tax revenues are allocated. The decision thus provides no support for granting *Chevron* deference to agency determinations of preemption.

V. THE *DE LA CUESTA* FORMULATION FOR ASSESSING AGENCY PREEMPTION SHOULD BE CLARIFIED

In several decisions of the 1980's, beginning with *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), the Court offered a formulation of the issues involved in determining the preemptive effect of an agency regulation. This particular formulation is potentially misleading since it omits any mention of traditional preemption doctrine. But neither *de la Cuesta*, nor its formulation of the issues, suggest

that agencies should be given *Chevron* deference on issues of preemption.

The question in *de la Cuesta* was whether a regulation of the Federal Home Loan Bank Board permitting due-on-sale clauses in mortgages initiated by federally-chartered savings and loan associations had the effect of preempting a California rule prohibiting due-on-sale clauses. The case presented a relatively straightforward question of conflict preemption. The Court decided all the critical issues itself, without deferring to any judgment by the Board about whether its regulation did or did not preempt California law.

At one point in his opinion for the Court, however, Justice Blackmun framed the issues to be decided in the following way:

> A preemptive regulation's force does not depend on express congressional authorization to displace state law. . . . Thus, the Court of Appeal's narrow focus on Congress's intent to supersede state law was misdirected. Rather, the questions upon which resolution of this case rests are whether the Board meant to pre-empt California's due-on-sale law, and, if so, whether that action is within the scope of the Board's delegated authority.

Id. at 154. This framing of the issues was subsequently repeated in a few later decisions. *See City of New York v. FCC*, 486 U.S. 57, 64 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984).

The Court in *de la Cuesta* was surely correct that congressional intent to preempt is not necessary when an agency's legislative regulation conflicts with state law. Under the Supremacy Clause, an agency regulation having the force of law is entitled to the same degree of protection against contrary state law as a federal statute. And the two conditions that must be satisfied in any case for a regulation to have the force of law are (1) a delegation of authority from Congress

to act with the force of law, and (2) the agency's intention to exercise such authority. *Mead*, *supra*. In other words, to use *de la Cuesta's* terms, agency intent to preempt and agency action within the scope of its delegated authority.

Unfortunately, this framing of the issues in *de la Cuesta* has been taken by some courts to mean that the *only* questions to be resolved in determining the preemptive effect of an agency regulation are whether the agency intended to preempt state law and whether it was acting within the scope of its authority. If this were all that is required, then any agency, as long as it was acting within the scope of its general regulatory authority, could preempt state law on its mere say-so. Agencies with general grants of rulemaking authority could become runaway engines of preemption. Such a state of affairs would be deeply troubling for all the reasons canvassed in the Part II, and would be thoroughly incompatible with our legal traditions.

What is missing from the quoted passage is a third requirement, which is simply a restatement of traditional preemption doctrine. *In addition to* asking whether the agency intended to preempt and whether the agency acted within the scope of its authority, the court must always ask whether displacement of state law is required under traditional preemption doctrine. Specifically, the court must inquire whether Congress has expressly provided for preemption, or whether preemption should be implied because of a conflict between state and federal law or because federal law has occupied the field. There is no reason to believe that the Court in *de la Cuesta* was disavowing traditional preemption doctrine. Elsewhere in the opinion the Court provided an apt summary of that doctrine, *see* 458 U.S. at 152-53, and there is little doubt that conflict preemption was properly found to exist on the facts presented.

Nevertheless, in the hands of some lower courts—including the Court of Appeals in the case under review—the

passage from *de la Cuesta* has been taken as stating a self-contained framework for assessing agency preemption, without regard to the elements of traditional preemption doctrine. *See* Pet. App. 6a-7a. When this truncated framework is coupled with *Chevron* deference—as again happened in the decision under review and in the similar cases decided by the Second and Ninth Circuits—the possibilities for agency preemption of state law become virtually limitless.

Clearly there is no need to overrule *de la Cuesta*. The case was correctly decided under established principles of conflict preemption. Likewise, *Crisp* was a straightforward conflict preemption case, and *City of New York* rested in significant part on congressional ratification of previous agency preemption decisions. Moreover, none of these decisions speaks to the question whether courts should give *Chevron* deference to agency preemption decisions. In each case the Court reviewed *de novo* both the question whether the agency intended its regulation to have preemptive effect, and whether it was acting within the scope of its authority. Indeed, none of the cases cites to *Chevron* (two pre-date *Chevron* and the third was decided a short time thereafter). In the interests of eliminating a potential source of confusion, however, it would be useful for the Court to take this occasion to clarify that *de la Cuesta* was not intended to modify the traditional elements of preemption doctrine in the context of agency determinations of preemption.

VI. THE SIXTH CIRCUIT APPLIED AN ERRONEOUS STANDARD OF REVIEW

The Sixth Circuit in the decision under review applied the *Chevron* standard of review in determining that Michigan banking laws are preempted insofar as they apply to state-chartered operating subsidiaries of nationally chartered banks. The Solicitor General has argued that a similar decision of the Second Circuit deferred to the OCC only on the question of the meaning of federal law, not on whether federal law

requires displacement of state law. *See* Brief for the United States as Amicus Curiae, *Burke v. Wachovia Bank, N.A.*, No. 05-431 (May 2006). Thus, the Solicitor General claims, it is the National Bank Act, not the agency, which is responsible for preemption of state visitation authority. This contention cannot be sustained.

The Court of Appeals expressly stated that it would resolve the *preemption question* "through the framework established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)." Pet. App. 7a. The court concluded that the National Bank Act was ambiguous on the question whether operating subsidiaries should be treated the same as a national bank itself for purposes of determining the scope and application of state law. *Id.* at 9a. It found that the OCC had answered that question 12 C.F.R. § 7.4006. *See Id.* at 6a. The court then asked, per *Chevron*, whether this was a "reasonable construction of the statutory scheme." *Id.* at 10a. It concluded: "The regulations, specifically section 7.4006, simply reflect the eminently reasonable conclusion that when a bank chooses to utilize the authority it is granted under federal law, it ought not be hindered by conflicting state regulations. . . . *Chevron requires us to defer to this reasonable interpretation.*" *Id.* at 11a (emphasis added).

This was error. For all the reasons previously discussed, the question whether to displace state law cannot be resolved by asking whether an agency's determination to find preemption is reasonable. If Congress has not expressly resolved the preemption question, then it should be resolved by the judiciary, applying judicially-developed standards for determining the scope of express preemption clauses and identifying the circumstances when implied preemption is required. The views of administrative agencies are entitled to respectful consideration in this process, under the *Skidmore* standard. But they should not be considering controlling merely because they can be characterized as reasonable.

Under the *Skidmore* standard, the focus of inquiry is not on the authority of the agency, but rather on the reasons it gives in support of its conclusion that preemption is warranted. The Court of Appeals did not consider the reasons given by the OCC in support of its determination that state bank visitation rules are preempted. Specifically, the court did not evaluate how long the agency has maintained that position, and whether the position has been consistently maintained. Nor did it consider whether the reasons cited by the OCC draw upon particular expertise of the agency in matters of involving the regulation of financial institutions, and its understanding of the differences between federal and state visitation requirements. If the Court evaluates the relevant OCC rules and decisions against the *Skidmore* standard, we believe it will find that the reasons given by the agency, such as they are, are unpersuasive. *See Investment Securities; Bank Activities; Leasing*, 66 Fed. Reg. 34784 (July 2, 2001); *Bank Activities and Operations*, 69 Fed. Reg. 1895 (Jan. 13, 2004). Alternatively, given that the Court of Appeals applied an erroneous standard, the Court may wish to consider reversing and remanding to the Court of Appeals for initial application of the proper standard.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 05-1342

IN THE

Supreme Court of the United States

LINDA A. WATTERS, COMMISSIONER,
MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES,

Petitioner,

—v.—

WACHOVIA BANK, N.A., AND
WACHOVIA MORTGAGE CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE CLEARING HOUSE ASSOCIATION L.L.C. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Clearing House Association L.L.C. (the "Clearing House") is an association of eleven leading commercial banks that, through an affiliate, provides payment, clearing and settlement services to its member banks and other financial institutions.[1] The members of the Clearing House include eight national banks.[2] These eight national banks, which have combined assets of over $4.45 trillion, carry out important banking activities through their operating subsidiaries.

The Clearing House is dedicated to protecting and promoting the interests of its members and the commercial banking industry. The Clearing House often presents the views of its members on important public policy issues impacting the commercial banking industry by, among other things, appearing as *amicus curiae* in this Court in cases raising significant questions of banking law.

Pursuant to the National Bank Act, 12 U.S.C. § 21 *et seq.*, Clearing House national banks conduct their banking business through operating subsidiaries in all 50 states. The

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[1] This brief is filed with the written consent of Petitioner and Respondents. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored any portion of this brief, nor did any person or entity other than the *amicus curiae* make any monetary contribution to the preparation or submission of this brief.

[2] The Clearing House member national banks are Bank of America, N.A.; Citibank, N.A.; HSBC Bank U.S.A., N.A.; JPMorgan Chase Bank, N.A.; LaSalle Bank, N.A.; U.S. Bank N.A.; Wachovia Bank, N.A. (one of Respondents here); and Wells Fargo Bank, N.A. With respect to the remaining three Clearing House member banks, The Bank of New York and Deutsche Bank Trust Company Americas are state-chartered banks, and UBS AG is subject to U.S. bank regulation under the International Banking Act.

Clearing House has a substantial interest in upholding the uniform, federal regulation of national bank operating subsidiaries. The Clearing House national banks perform important banking activities, including mortgage, auto, small business and student lending, through approximately 1,000 operating subsidiaries; these operating subsidiaries have aggregate assets of more than $500 billion.

Clearing House national banks use operating subsidiaries for a variety of reasons, including to facilitate branding and marketing, to adopt specialized compensation and management structures, to ease the purchase and sale of businesses, and to enhance regulatory reviews and compliance. By conducting their banking activities through operating subsidiaries, Clearing House national banks achieve significant efficiencies. The application of countless, often unpredictable, overlapping and inconsistent state and local restrictions would impose substantial costs and burdens on Clearing House national banks and their customers.

SUMMARY OF ARGUMENT

In 1864, Congress passed the National Bank Act to establish a system of national banks in need of protection from "possible unfriendly State legislation." *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412 (1873). This Court has long acknowledged the unique status of national banks and the strict limits that the National Bank Act imposes on the power of states to regulate the banking activities of national banks. *See Easton* v. *Iowa*, 188 U.S. 220, 238 (1903); *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). As confirmed by this Court's rejection of any attempts by states to regulate such banking activities, "[n]ational banks are instrumentalities of the federal government, created for a public purpose, and as such

necessarily subject to the paramount authority of the United States." *Davis*, 161 U.S. at 283.

In Section 24 (Seventh) of the National Bank Act, Congress broadly authorized national banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking." In doing so, Congress specifically charged the Office of the Comptroller of the Currency ("OCC") with administering this Act and left many parts of that regulatory scheme to implementing regulations of the OCC, which "maintain[s] virtually a day-to-day surveillance of the American banking system." *United States* v. *Phila. Nat'l Bank*, 374 U.S. 321, 329 (1963). For many of the Clearing House national banks, such surveillance occurs through teams of OCC examiners who are permanently on site conducting comprehensive and systematic reviews.

Since 1966, the OCC has expressly recognized that national banks' powers include the authority to conduct their banking business through the business form of the operating subsidiary. OCC regulations limit the activities of such subsidiaries to those banking activities that their parent national banks may engage in, and operating subsidiaries are treated as part of their parent national bank for purposes of applying federal rules and regulations. In addition, in amendments to federal banking laws, Congress has expressly recognized the important and useful role of national bank operating subsidiaries in the conduct of the business of banking.

Therefore, for at least 40 years, the managers of national banks have had flexibility in structuring their operations: such banks may conduct their banking activities in the bank itself, or they may conduct such activities through operating subsidiaries. In either case, the federal regulatory scheme is the same.

Petitioner and her *amici* fail to address the fundamental issue presented by this case. Because operating subsidiaries simply are an organizational form through which national banks choose to conduct their banking activities, as authorized by Congress and federal bank regulators, a state's attempt to regulate the banking activities of an operating subsidiary constitutes regulation of national banks. If such regulation is permitted, the managers of national banks would face the choice of abandoning the most efficient and beneficial business form for the conduct of their banking activities, or being subject to overlapping and inconsistent regulations in every state and every municipality in which they conduct lending and other banking activities through operating subsidiaries.

By any measure, subjecting the *banking* activities of national bank operating subsidiaries to such regulation would interfere with national banks' powers and frustrate the purposes of the National Bank Act. Unless rejected by this Court, Petitioner's position would undo nearly two centuries of law, dating to *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), zealously protecting the powers of nationally-chartered banks from state and local regulation.

Following the uniform and unanimous decisions of four Courts of Appeals, this Court should affirm what Congress has already decided: that national banks have broad powers to conduct their banking activities, and that the states and localities should not be able to upset the national system of bank regulation simply because national banks elect to make use of the beneficial and efficient business form of the operating subsidiary to conduct some of their banking activities.

ARGUMENT

I. THE NATIONAL BANK ACT GRANTS NATIONAL BANKS THE POWER TO CONDUCT THEIR BANKING ACTIVITIES THROUGH OPERATING SUBSIDIARIES.

In 1864, Congress enacted the National Bank Act to create a "national banking system." *Marquette Nat'l Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 315 (1978). Because Congress recognized that banking would need to evolve to meet the changing needs of the Nation, Congress did not restrict the "business of banking" by attempting to define such business as banking existed in 1864. Rather, the National Bank Act provides that national banks have "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh).[3]

As this Court has held, in the "incidental powers" clause, Congress broadly granted national banks the power to conduct the "business of banking" beyond those "enumerated powers in § 24 Seventh." *NationsBank* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995). Moreover, this Court has further recognized that, "[a]s the administrator charged with supervision of the National Bank Act," the OCC "bears primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh." *Id.* at 256.

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[3] The National Bank Act also provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law. . . ." 12 U.S.C. § 484(a).

Because the "business of banking" is to be construed broadly, this Court has repeatedly recognized that the OCC is authorized to identify "incidental powers" that are "necessary" for a national bank to "carry on the business of banking." *Id.* at 258-260, 264. The incidental powers of national banks include those activities and structures that are "convenient or useful" in carrying out the business of banking. *See Sec. Indus. Ass'n* v. *Clarke*, 885 F.2d 1034, 1049 (2d Cir. 1989); *Arnold Tours, Inc.* v. *Camp*, 472 F.2d 427, 430 (1st Cir. 1972).

The OCC has long recognized that the "incidental powers" clause includes authority not only for banking services and products but also activities that facilitate a national bank's general operations as a business enterprise. These activities include hiring employees, advertising, issuing stock to raise capital, owning or renting equipment, borrowing money for operations other than through deposits, purchasing assets, and operating through optimal corporate structures such as subsidiary corporations.[4] Indeed, for at least 40 years, the OCC has confirmed that the incidental powers of national banks under Section 24 (Seventh) include the power to conduct their banking activities through the business form of an operating subsidiary.[5]

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[4] *See, e.g.*, OCC Regulation on Electronic Activities, 67 Fed. Reg. 34,992, 34,995 (May 17, 2002) (to be codified at 12 C.F.R. pt. 7); *Franklin Nat'l Bank* v. *New York*, 347 U.S. 373, 377 (1954).

[5] *See Current Legal and Regulatory Developments*, NAT'L BANKING REVIEW, Dec. 1963 at 264 (a national bank "may carry on indirectly activities which are incidental to banking transactions" through subsidiaries); Testimony of James J. Saxon Before the House Committee on Banking and Currency, June 30, 1965, Office of the Comptroller of

(footnote cont'd)

In 1966, the OCC first promulgated specific regulations authorizing national banks to conduct their banking activities through operating subsidiaries. These regulations limit the activities of operating subsidiaries to those activities that their parent national banks may conduct, and subject the activities of operating subsidiaries to the "same authorization, terms and conditions" that apply to activities of parent national banks.[6]

Under OCC regulations, the operating subsidiary of a national bank is treated as part of the bank for regulatory purposes, and the subsidiary's accounts are fully consolidated with those of its parent bank. *See* 12 C.F.R. §§ 5.34(e)(3), (4). For example, for purposes of filing financial reports (so-called "call" reports) and calculating lending limits and reserves, the accounts of national banks and their operating subsidiaries are aggregated.[7] Thus, the OCC's

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(footnote cont'd)

the Currency, 102ND ANNUAL REPORT 256 (1964) ("It has long been settled law that for various business considerations, a National Bank may carry on certain of its banking activities such as mortgage servicing either directly or through a subsidiary corporation.").

[6] 12 C.F.R. § 5.34(e)(3); *see also* Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,459 (Aug. 25, 1966) (to be codified at 12 C.F.R. pt. 7) ("A subsidiary operations corporation is a corporation the functions or activities of which are limited to one or several of the functions of activities that a national bank is authorized to carry on.").

[7] *See* 12 C.F.R. § 5.34(e)(4); 12 C.F.R. § 204.3(a); 12 U.S.C. § 84; FFIEC 031, Instructions for Preparation of 031 and 041, available at http://www.ffiec.gov/forms031.htm (last visited Nov. 2, 2006).

regulations make clear that the use of operating subsidiaries does not expand the scope of permissible activities of national banks.

In fact, this Court has recognized that national banks may conduct their banking activities through operating subsidiaries. In *NationsBank*, this Court considered whether the OCC reasonably concluded that the "business of banking" under Section 24 (Seventh) included the sale of annuities. *See* 513 U.S. at 255-56. In that case, the national bank was proposing to sell annuities through an operating subsidiary. *See id.* at 254. In approving the sale of annuities as a permissible part of the business of banking, the Court did not draw any distinctions between the exercise of such incidental banking power through the national bank itself or through such bank's operating subsidiary. *See id.* at 256-61.

Beyond the broad grant of authority to national banks in the National Bank Act, other amendments to the federal banking laws confirm Congress' recognition that operating subsidiaries are a convenient and useful organizational form for such banks. For example, in the 1982 and 1987 amendments to Sections 23A and 23B of the Federal Reserve Act—two of the most fundamental provisions in the federal bank regulatory scheme—Congress explicitly treated certain subsidiaries, including operating subsidiaries, as part of the bank itself and not as a separate affiliate.[8] These

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[8] *See* Garn-St Germain Depository Institutions Act, § 410, Pub. L. No. 97-320, 96 Stat. 1469, 1515-16 (1982); Act of Aug. 10, 1987, Pub. L. No. 100-86, 101 Stat. 552, 564-66 (1987) (amending 12 U.S.C §§ 371c, 371c-1). Moreover, as noted by Respondents, in the Gramm-Leach-Bliley Financial Modernization Act of 1999, Congress recognized that operating subsidiaries of national banks are corporate entities subject to (footnote cont'd)

statutes regulate the quantity and quality of banks' transactions with their affiliates to protect an insured bank (and the deposit insurance fund) from the risk that the bank's assets will be diverted through unsound transactions that benefit its uninsured affiliates. Congress imposed no restrictions on transactions between a bank and its subsidiaries, but did so for transactions between a subsidiary and any company that is deemed a separate bank affiliate.[9]

In addition to Congress and the OCC, the Office of Thrift Supervision and the Board of Governors of the Federal Reserve have promulgated regulations authorizing federal savings associations and state member banks, respectively, to use operating subsidiaries.[10] Echoing the OCC, the Federal Reserve has explained:

(footnote cont'd)

the same terms and conditions that govern the conduct of such activities by national banks. (*See* Resp. Br. at Part I.A.2.)

[9] The legislative history of the Garn-St Germain Depository Institutions Act explained: "[a] majority-owned subsidiary should be regarded as part of its parent bank and therefore, transactions between the two should be unrestricted." S. Rep. No. 97-536, at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3054, 3085; *see also* FRB Interp. Ltr. No. 3-1177.1 (Aug. 19, 1983) (explaining that Garn-St Germain excluded bank subsidiaries from Section 23A "because Congress viewed transactions involving a bank and its nonbank subsidiaries as akin to internal bank operations.").

[10] *See* 12 C.F.R. §§ 559.3(n)(1), 559.2, 223.3(w), 250.141(c). Furthermore, all 50 states authorize state-chartered banks to establish operating subsidiaries that engage in activities that the bank is authorized to engage in directly. *See* The Conference of State Bank Supervisors, *A Profile of State Chartered Banking*, 20th Ed. 2004-2005, at 40-42.

> One method of organization is through a department of the bank; and an alternative is a subsidiary wholly owned by the bank. The decision as to which of the two is more efficient is one that bank management is best qualified to make, and one that our free enterprise system normally leaves to management in the absence of some overriding public interest. It should be emphasized that the question is purely one of organizational structure, since the subsidiary is strictly limited to functions the bank is already authorized to perform.[11]

In short, under the National Bank Act's broad grant of authority, Clearing House national banks have the power to use operating subsidiaries. Such use is simply an "additional option[ ] in structuring their business" through which national banks may conduct their banking activities. 31 Fed. Reg. at 11460.

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[11] *Federal Reserve Rulings Regarding Loan Production Offices and Purchases of Operating Subsidiaries: Hearing Before the H. Comm. on Banking and Currency*, 90TH CONG. 28 (1968) (statement of William McChesney Martin, Jr., Chairman of the Board of Governors).

II. OPERATING SUBSIDIARIES ARE A CONVENIENT AND USEFUL FORM OF BUSINESS ORGANIZATION FOR NATIONAL BANKS.

A. The Clearing House National Banks Use Operating Subsidiaries To Perform Many Important Banking Functions.

The Clearing House national banks perform their banking activities through approximately 1,000 operating subsidiaries. The aggregate assets of these subsidiaries total more than $500 billion. Of those operating subsidiaries, 259 interact directly with consumers.[12]

A principal use of operating subsidiaries by Clearing House national banks is mortgage lending, which provides funding for millions of Americans to build and to purchase their homes, thereby strengthening the Nation's economy and social structure. In addition to mortgage-oriented businesses, the Clearing House national banks rely on operating subsidiaries to perform a wide variety of important banking activities, including:

- Small business lending – operating subsidiaries originate and service loans to small businesses. The majority of this lending is done in partnership with the U.S. Small Business Administration, a government agency that acts as guarantor of loans to qualified small businesses.

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[12] According to the OCC, the total number of operating subsidiaries conducting business with consumers is 475. *See* Annual Report of National Bank Operating Subsidiaries That Do Business Directly With Consumers. www.occ.treas.gov/consumer/Report%20-%202006.htm (last visited Nov. 2, 2006).

- Auto financing/lending – operating subsidiaries originate and service auto loans and purchase lease contracts from automobile dealers.
- Student loans – operating subsidiaries originate, manage, market and service student loans. This lending includes partnering with SLM Corporation, a public company (commonly known as Sallie Mae and formerly a government-sponsored entity) that is the nation's leading originator and holder of federally guaranteed student loans.
- Commercial lending – operating subsidiaries originate and service loans for commercial clients.
- Commercial equipment leasing – operating subsidiaries originate, and provide financing for, commercial equipment leases.
- Annuities – operating subsidiaries sell annuities.
- Credit insurance business – operating subsidiaries sell insurance to borrowers against risks such as death, disability, or job loss that could render the borrower/insured unable to make loan payments.
- Administrative support – operating subsidiaries provide a variety of back-office services, including processing and servicing for lending and other activities.
- Funding such as securitization – loan assets for mortgages, credit cards, and auto loans are transferred into operating subsidiaries as part of the process by which such assets are efficiently converted into marketable securities sold to investors.

- Investment advisory business – operating subsidiaries provide consumers with advice for investments in mutual funds and other financial products.
- Broker-dealer services – operating subsidiaries provide retail customers with a range of traditional securities brokerage functions.

Petitioner's position would permit states to regulate—without limitation—the *banking* activities of national bank operating subsidiaries. Thus, state and local regulation of the approximately 1,000 operating subsidiaries of Clearing House national banks would impact not only mortgage lending activities but also dozens of other banking activities of national banks. Such boundless regulation of national banks would affect adversely such banks' ability to provide important banking services to their customers and the communities in which those banks operate.

B. Operating Subsidiaries Permit National Banks To Structure Their Operations Flexibly and Efficiently.

Like other businesses, national banks conduct their banking activities through operating subsidiary structures to promote important business objectives—for the benefit of their shareholders, customers and communities. The "choice of organizational form provides flexibility in business decisions regarding what structure best positions [national banks] to meet customer needs."[13]

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[13] Cynthia Glassman, *Banking Organization: The Debate Surrounding Bank Operating Subsidiaries*, BANKING POL'Y REP., May 3, 1999 at 12 [hereinafter Glassman].

As the OCC has stated, national banks may desire to use operating subsidiaries "for many reasons, including controlling operations costs, improving effectiveness of supervision, more accurate determination of profits, decentralizing management decisions or separating particular operations of the bank from other operations." 31 Fed. Reg. at 11460. Although Petitioner's *amici* focus solely on national banks' use of operating subsidiaries to limit their risk of liability from the investments of the subsidiary businesses—which is, after all, a legitimate business objective—national banks establish operating subsidiaries for many reasons, including the following:

Promoting branding, marketing and corporate culture. Distinct corporate entities such as operating subsidiaries promote branding, marketing and corporate culture.[14] To appeal to diverse segments of their customer base, national banks may give their operating subsidiaries different names. For example, where a national bank has acquired an operating subsidiary, the bank may decide that preserving the distinct corporate entity is the best way to maintain the brand, reputation and culture associated with the acquired company. Or, a bank may use a different name for its operating subsidiary to differentiate that business from the bank's other functions.

Facilitating acquisitions and sales of business lines. The use of operating subsidiaries facilitates the entry, growth and exit of distinct business lines by national banks. It is often more efficient to enter a new business line by acquiring a separate firm already engaged in that business. Many

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[14] *See* Glassman at 14.

Clearing House national banks acquired certain of their mortgage lending operating subsidiaries through such acquisitions. Distinct corporate entities such as operating subsidiaries are easier to value, and the process of transferring a business usually is more efficient and cost-effective by buying or selling the stock in the business, as opposed to a transfer of all its assets and liabilities. Such a stock sale also promotes efficiencies in the transition of employees, payroll, and office space.

For the same reasons, holding a banking business in a separate entity facilitates the bank's ability to sell that entity if the bank later decides to exit the business. The separate entity's management, contractual and other relationships, assets and liabilities can be transferred through a sale of the corporate entity. If an acquired business is formally integrated into the parent bank's operations as a division rather than an operating subsidiary, the process of later disaggregating that business for purposes of a sale likely will be substantially more complicated.

Distinguishing compensation and designating responsibilities. Distinct corporate entities such as operating subsidiaries are effective for adopting specialized compensation structures, which enable national banks to attract highly qualified employees and compete with other firms.[15] For example, the use of operating subsidiaries permits national banks to adopt divergent compensation

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[15] *See* Glassman at 14 (finding that "to prevent clashes within the organization, it is often easier to manage activities with compensation schemes that differ from that of the traditional bank in a separate organization").

structures (commission- or other incentive-based compensation versus flat salaries) in those separate entities. Through the use of operating subsidiaries, a national bank can structure incentive compensation linked to the performance of a separate subsidiary (which maintains separate financial statements and performance statistics). As a recruiting and retention tool, national banks also can give senior executives of a business line, housed in an operating subsidiary, traditional corporate titles such as a CEO or president, not available in the national bank.

Promoting beneficial transactions with third parties. National banks facilitate transactions with third parties by isolating certain businesses or projects into separate operating subsidiaries. For example, a separate subsidiary is a more efficient, and often the only feasible, vehicle for national banks to attract joint venturers or investors in a specific project or business line of the bank. Likewise, national bank shareholders may not want third parties to invest in the bank itself as opposed to a specific line of business. If all the bank's multiple banking businesses are housed in a single national bank, these types of innovative and adaptive structures would not be possible. Moreover, the creditworthiness of a bank business often is easier to assess in a separate corporate entity, thereby facilitating the bank's ability to finance that business (*e.g.*, issuance of a debt instrument by that entity).

Enhancing regulatory review and compliance. Operating subsidiaries permit national banks to house certain activities that may be carried out by a national bank itself but are also subject to complex, federally-mandated regulatory restrictions specific to those activities. For example, some types of lending activities (*e.g.*, loans guaranteed or insured under government programs administered by the Small

Business Administration, the Veterans Administration or the Fair Housing Administration) may be subject to specialized regulatory requirements such as licensing, training for relevant officers, audits, or other requirements. By isolating these audits and requirements into a separate entity, national banks can comply more efficiently and effectively with these special regulatory obligations.

Moreover, a national bank engaging in certain securities activities would be required to register with the Securities and Exchange Commission ("SEC"). Such activities would subject the entire bank to SEC examination as well as complex capital and other substantive restrictions on the business. Without the operating subsidiary structure, national banks and their regulators would face the burdensome task of isolating the activities and personnel within the bank for each of those separate businesses for purposes of different regulatory reviews, or submitting the whole bank to an additional onerous regulatory scheme. Carrying out such activities through a separate corporate entity reduces regulatory burdens and avoids disruption to the bank as a whole.

Other benefits of operating subsidiaries. Through the use of operating subsidiaries, national banks can manage certain tax obligations in a more efficient and effective manner. While national banks may, from time to time, use operating subsidiaries to minimize risk by allocating those risks to particular businesses (which is a legitimate, prudent and widespread use of a subsidiary structure), many of the principal activities conducted by operating subsidiaries, including mortgage lending, are among the least risky of bank activities.

In sum, the Clearing House national banks choose the business form of the operating subsidiary to conduct banking activities for a variety of entirely lawful and beneficial reasons. Through the use of operating subsidiaries, Clearing House national banks realize efficiencies and other advantages that generate increased revenues and assets, which in turn allow such banks to make more loans, provide improved services, and pass along some of their savings through cost reductions. The decision by national banks to conduct permissible banking activities—which those banks can conduct in the bank itself—through the use of such subsidiary business form should not trigger the imposition of a wide array of conflicting state and local regulation.

III. STATE AND LOCAL REGULATION OF NATIONAL BANKS THROUGH THEIR OPERATING SUBSIDIARIES WOULD FRUSTRATE THE PURPOSES OF THE NATIONAL BANK ACT.

A. Petitioner's Attempt To Control the Conduct of National Banks Through Their Operating Subsidiaries Would Interfere Significantly with Such Banks' Exercise of Their Statutory Powers.

The National Bank Act strives for "uniformity"— a national banking system "substantially the same in Washington, in New York, in Boston, and in Chicago," rather than one subject to "complications and differences" under the laws of different states. CONG. GLOBE, 38th Cong., 1st Sess. 1873 (Apr. 28, 1864) (remarks of Sen. Sumner). Essential to such uniformity is "the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose

limitations and restrictions as various and as numerous as the states." *Easton*, 188 U.S. at 229; *see also Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 10-11 (2003).

Because of the borderless nature of credit and other banking markets in the United States, national banks must be allowed to operate in multiple jurisdictions pursuant to uniform regulation. Where, as here, a state's attempt to "control the conduct" of national banks "frustrates the purpose of the national legislation," such attempt is "absolutely void." *Easton*, 188 U.S. at 238. A state or locality is prohibited from regulating a national bank where doing so would "prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank* v. *Nelson*, 517 U.S. 25, 33 (1996).

Petitioner agrees that a national bank's statutory authority includes the incidental power under Section 24 (Seventh) to use the operating subsidiary structure, as well as the power to engage in the underlying banking activity. In the National Bank Act, Congress sought to enable national banks to conduct their business and to serve their customers in the most efficient and effective manner. Thus, Petitioner would "frustrate the purpose" of the National Bank Act by subjecting a national bank's activities to restrictions "as varied and numerous as the states" simply because those activities are conducted through an operating subsidiary.

Just as this Court has held that a state improperly attempts to "regulate and control the exercise of [national banks'] operations" by applying state laws to the national bank employees, *Easton*, 188 U.S. at 238, a state similarly regulates and controls the bank's operations by applying its laws to such bank's operating subsidiaries. Because the state law at issue in *Easton* (prohibiting an insolvent bank from accepting deposits) could not be applied to the national bank,

this Court held that this law could not be applied to the national bank's president for his actions in carrying out the bank's operations. When a state attempts to apply an otherwise preempted state law to a national bank's employees or to its operating subsidiaries, the state interferes with the bank's power to conduct the underlying banking activity (*e.g.*, lending or deposit taking), and with the bank's incidental power to utilize employees or operating subsidiaries.

This Court should reject Petitioner's attempt to "impair [the] efficiency" of national banks' exercise of their federally authorized powers. *Barnett Bank*, 517 U.S. at 33. If, as Petitioner proposes, state laws apply to operating subsidiaries to a far greater extent than to parent national banks, Clearing House national banks would be forced to choose between the uneconomic and inefficient alternatives of: (i) moving operations back into the national bank itself, foregoing the efficiencies and benefits from housing them in subsidiaries, or (ii) complying with a widely varied and even conflicting panoply of state and local regulation in addition to federal laws.

B. The OCC Engages in Comprehensive and Uniform Regulation of National Banks and Their Operating Subsidiaries.

Petitioner's attempt to subject national banks and their operating subsidiaries to myriad state and local regulations would not fill a regulatory gap but would rather increase the regulatory burden on such banks. Under the National Bank Act, the OCC has plenary licensing, regulatory, supervisory, examination, and enforcement authority over national banks and their operating subsidiaries. This regulatory scheme applies equally to both

national banks and their operating subsidiaries. *See* 12 C.F.R. § 5.34(e)(3).

With more than 1,800 field examiners, the OCC conducts extensive risk-based examinations of national banks and their operating subsidiaries. For purposes of its regulatory review, the OCC does not differentiate between national banks and their operating subsidiaries. If the OCC determines that such subsidiaries are violating any law or regulation, or operating in a manner that threatens the safety or soundness of the bank, the OCC will direct the bank or subsidiary to halt the illegal or unsound practice and take appropriate remedial action. *See* 12 C.F.R. § 5.34(e)(3). To ensure enforcement, Congress has equipped the OCC with effective tools, including forfeiture of charter, civil money penalties, cease and desist orders, restitution, and removal of officers and directors. *See, e.g.*, 12 U.S.C. §§ 93, 1818.

The operating subsidiaries of Clearing House national banks conduct banking activities in all 50 states. Petitioner specifically seeks to apply countless, often unpredictable, overlapping and inconsistent state and local regulation to an area of banking business—mortgage lending, where federal laws and regulations already regulate this banking activity by national banks and their operating subsidiaries.[16] Not only does the OCC enforce these federal

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[16] These laws include the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*, the Truth in Lending Act and Home Ownership and Equity Protection Act, 15 U.S.C. § 1601 *et seq.*, the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, the Home Mortgage Disclosure Act, 12 U.S.C. § 2801 *et seq.*, the Homeowners Protection Act, 12 U.S.C. § 4901 *et seq.* and the Equal Credit Opportunity Act, 15 U.S.C. § 1691.

laws, but the OCC also enforces state consumer protection laws against operating subsidiaries of national banks—to the same extent that those laws are enforced against parent national banks.[17]

Contrary to the assertions of Petitioner and her *amici*, the OCC's effectiveness cannot be measured by looking solely at the number of formal OCC enforcement actions. These public actions represent just a small fraction of the OCC's ongoing efforts—both formal and informal—to ensure regulatory and legal compliance and safe and sound banking through its regular and rigorous on-site examinations. Numerous full-time examiners are assigned to each large bank, including several Clearing House national banks, and are physically located on the premises of such banks, thereby facilitating efficient and effective examinations. For example, at least three dozen on-site OCC examiners conduct examinations at Wachovia Bank and its operating subsidiaries. And, at the largest national bank, Bank of America, at least five dozen on-site OCC examiners are dedicated to the bank and its operating subsidiaries.

Through this extensive network of examiners interacting with national banks and their operating

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[17] In the Riegle-Neal Interstate Branch Banking and Efficiency Act of 1994, Congress made clear that the provisions of any state law to which a branch of a national bank is subject—including consumer protection and fair lending—"shall be enforced, with respect to such branch, by the Comptroller of the Currency." 12 U.S.C. § 36(f)(1)(B). Moreover, operating subsidiaries, like their parent national banks, also are subject to numerous non-preempted state laws that do not regulate the business of banking, including contract, tort, tax and criminal law.

subsidiaries on a regular basis, the OCC assures that such banks and subsidiaries develop robust compliance regimes that prevent violations. The OCC does so by engaging in intensive examinations of Clearing House national banks and their operating subsidiaries, focusing on the entirety of an institution's lending practice, rather than imposing specific operating practices. This institution-specific approach protects consumers through the examination process without requiring excessive regulations restricting the availability of legitimate credit. Moreover, this approach is effective because during the examination process, managers of national banks usually agree to changes requested by bank supervisors without the need for any formal enforcement action.[18]

In September 2006, as part of the OCC's preventative program, the OCC and other federal banking agencies jointly issued guidance to address the risks posed by non-traditional mortgages, which include residential mortgage products that allow borrowers to defer repayment of principal and sometimes interest. Among other things, the OCC's guidance states that financial institutions should provide consumers with sufficient information about loan terms and associated risks prior to making a product or

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[18] *See* Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE 15.15 (2002) ("To the extent that an agency possesses significant discretionary power over a class of regulatees or beneficiaries, many are likely to 'comply' 'voluntarily' with an agency's 'non-binding' statement of its preferred policies.").

payment choice, as well as implement loan terms and underwriting standards that are consistent with sound lending practices. By contrast, as of the date of the issuance of the guidance, the states have not yet adopted uniform guidance for non-traditional mortgages, or imposed on mortgage brokers the same high standards applied to federally-regulated institutions.

C. State and Local Regulation of Operating Subsidiaries Would Impose Undue Burdens on National Banks and Their Customers.

Subjecting operating subsidiaries to countless state and local laws and ordinances would create an enormous regulatory burden on national banks—to the detriment of their customers, communities, shareholders, and the Nation's economy.

In mortgage lending alone, different states have adopted a patchwork of highly detailed and prescriptive laws regulating virtually every aspect of the lending process. Examples include restrictions on:

- Advertising and disclosure, such as prohibiting the use of certain statements and, in most states, imposing specific required disclosures.[19]

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[19] *See, e.g.*, ALA. CODE § 5-19-6; CAL. CIV. CODE § 1785.20.2; COLO. REV. STAT. § 38-40-102; CONN. GEN. STAT. § 49-6d; 5 DEL. CODE ANN. § 2231(3); FLA. STAT. CH. 494; 38 ILL. ADMIN. CODE § 1050.1110; KAN. STAT. ANN. §§ 9-2208, 50-1006; KY. REV. STAT. ANN. § 291.510; MD. CODE ANN., COM. LAW §§ 12-106, -119, -120, -124.1, -125; MICH. COMP. LAWS § 445.1605, .1636-.1637; MISS. CODE ANN. § 81-18-33; N.Y. BANKING LAW § 595-a; N.C. GEN. STAT. § 24-1.1A(a1); 41 PA. STAT.

(footnote cont'd)

- Applications, including disclosure requirements and various restrictions on the use of "rate lock" or loan commitment agreements.[20]
- Loan terms and conditions, such as limits on possible fees and interest rates, maximum loan terms, maximum and minimum loan amounts, and proscriptions on how loan payments may be applied.[21]
- Post-closing loan servicing, including required disclosures or restrictions on how payments are applied.[22]

While Petitioner seeks to enforce these varied state laws relating to mortgage lending, national banks and their operating subsidiaries already are subject to comprehensive

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(footnote cont'd)

ANN. § 301; TEX. FIN. CODE ANN. § 157.007; W. VA. CODE § 31-17-9; WIS. STAT. § 138.052(7e)(b).

[20] *See, e.g.*, ARIZ. REV. STAT. ANN. §§6-906.C, 6-946.C; 38 ILL. ADMIN. CODE § 1050.1110, 20, 40-60; IOWA CODE § 535.8(2); 10 VA. ADMIN. CODE 5-160-30; ALA. CODE § 5-19-20(b); 10 CAL. CODE REG. § 1950.204; COLO. REV. STAT. § 5-1-301(26)(c); N.Y. BANKING LAW § 6-d; 3 N.Y. COMP. CODE R. & REGS. § 38.3.

[21] *See, e.g.*, VA. CODE ANN. § 6.1-330.71; GA. CODE ANN. § 7-4-17; CAL. CIV. CODE § 2955.5; COLO. REV. STAT. § 5-3-204; 5 DEL. CODE ANN. § 2242; 765 ILL. COMP. STAT. § 915/1; KAN. STAT. ANN. § 58-2312.

[22] *See, e.g.*, ARIZ. REV. STAT. ANN. § 6-909.K; IOWA CODE § 535B.12; 38 ILL. ADMIN. CODE § 1050.840-.850; N.Y. GEN. OBLIG. LAW § 5-501; N.M. STAT. § 56-8-30; N.J. STAT. ANN. § 46:10B-2; N.Y. REAL PROP. TAX LAW § 953(8).

federal law and regulations governing this banking activity. For example, the Truth in Lending Act, the Home Ownership and Equity Protection Act, and the Real Estate Settlement Procedures Act impose loan disclosure and advertising requirements and restrict certain mortgage loan terms.[23] The National Bank Act limits permissible fees and interest rates,[24] and the Equal Credit Opportunity Act imposes loan application requirements.[25] Moreover, the Real Estate Settlement Procedures Act and the Homeowners Protection Act regulate mortgage servicing practices.[26]

Compounding the difficulty of compliance with the regulations of 50 states are the inconsistencies among these regulations. For example, with respect to regulating post-closing fees and payments, New Hampshire permits prepayment penalties at any time so long as there is a conspicuous disclosure to the consumer. *See* N.H. REV. STAT. ANN. § 397-A:15. New York permits prepayment penalties during the first year of the mortgage, *see* N.Y. GEN. OBLIG. LAW § 5-501, and New Mexico and New Jersey have complete prohibitions on prepayment penalties, *see* N.M. STAT. ANN. § 56-8-30; N.J. STAT. ANN. § 46:10B-2.

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[23] 15 U.S.C. § 1601 *et seq.*; *see also* 12 C.F.R. pt. 226; 12 U.S.C. § 2601 *et seq.*

[24] 12 U.S.C. §§ 85, 86.

[25] 15 U.S.C. § 1691 *et seq.*; *see also* 12 C.F.R. pt. 202.

[26] 12 U.S.C. § 2601 *et seq.*; 12 U.S.C. § 4901; *see also* 24 C.F.R. pt. 3500.

With respect to loan terms and conditions, Colorado prohibits subordinate-lien loans when the amount of the loan is $3,000 or less, *see* COLO. REV. STAT. § 5-3-204, while Maine prohibits such small subordinate-lien loans only in cases where the same lender also holds a first mortgage on the real estate at the time of the subordinate-lien loan, *see* ME. REV. STAT. TIT. 9-A § 2-307(2). With respect to late payment charges, many states provide various limits. For example, Delaware limits such charges to 5% of the late payment amount, *see* 5 DEL. CODE ANN. § 2231(2), and Maryland limits such charges to the greater of $2 or 5% of the late payment, *see* MD. CODE ANN. COM. LAW § 12-105.

The uncertain scope of state lending laws also threatens to disrupt securitization markets, which are critical to providing liquidity to mortgage lenders. Credit rating agencies have been unable to provide the necessary rating for mortgage loan pools covered by so-called anti-predatory laws of certain states. For example, Standard & Poor's refused to rate securitized assets that included mortgage loans subject to Georgia's anti-predatory lending law, which imposed punitive damages on all parties involved in the prohibited transaction including any party underwriting the securitization.[27]

Thus, further state and local regulation of Clearing House national banks through their operating subsidiaries would materially increase compliance costs, and ultimately reduce lending and other activities by banks and make those activities more expensive and less available for consumers.

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[27] *See* Agnes T. Crane, *S&P Won't Rate Some Mortgages*, WALL ST. J., Jan. 20, 2003, at B8.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

LINDA WATTERS, COMMISSIONER, MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES,
Petitioner,

v.

WACHOVIA BANK, N.A., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

AMICI CURIAE BRIEF OF ECONOMISTS AND SCHOLARS MARCUS COLE, CHRISTOPHER DEMUTH, RICHARD EPSTEIN, ROBERT LITAN, MICHAEL STATEN, PETER WALLISON AND TODD ZYWICKI IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE ECONOMISTS AND SCHOLARS

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[1] The parties have consented to this brief through a blanket consent letter filed by petitioner and a letter of consent by respondents to this brief, which has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. No person or entity other than *amici*'s counsel, Competitive Enterprise Institute, made a monetary contribution to the preparation or submission of this brief.

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The positions taken in this brief by these individuals are their own and not those of the organizations with which they are affiliated.

SUMMARY OF ARGUMENT

The wisdom of state consumer credit regulations is not a factor in resolving federal banking preemption disputes. Nonetheless, the State of Michigan and its supporting *amici* have injected that issue into this case. But as both case law and economic research demonstrate, such measures can often backfire, hurting the very consumers that they are intended to protect by making credit more expensive and less available.

The Office of the Comptroller of the Currency (OCC) has the dual function of overseeing both national banks and the treatment that customers receive from those banks. Given the inherent relationship between these two functions, the OCC's oversight is far more likely to produce a

regulatory optimum than the approach advocated by the petitioner.

ARGUMENT

I.

THIS COURT SHOULD REJECT PETITIONER'S ATTEMPT TO CLAIM THE MANTLE OF CONSUMER PROTECTION

The question on which certiorari was granted in this case is the narrow issue of whether the OCC properly determined the preemptive effect of one of its regulations on Michigan's mortgage lending laws. But Michigan and its supporting *amici* have cast this as a much broader issue of consumer protection. Whatever the merits of their approach, their substantive claims deserve a response.

Michigan states that a major purpose of its mortgage lending statutes and regulations is "to protect consumers from unfair, unsound, and abusive lending practices." Pet. Brief at 5. *See also id.* at 11 ("States have a substantial interest in protecting their citizens from abusive mortgage lending practices ..."). Similarly, the Center for State Enforcement of Antitrust and Consumer Protection Laws argues in its amicus that "preemption of state banking laws by the Office of the Comptroller of the Currency will result in inadequate protection of consumers against predatory lending practices and other abuses ...." Center Amicus Brief at 1.

Consumer protection receives even more attention in the joint amicus brief filed by AARP, eleven other consumer groups, and seventeen law professors. According to AARP, consumer protection is *the* issue before this Court: "At issue

in this case is whether the states will be able to protect their citizens from abuses by national bank operating subsidiaries established under the states' own charters." AARP Brief at 3. AARP contends that states and localities "are much more likely than the federal government to appreciate the impact of abusive lending practices" (*id.* at 8) and that "empirical studies have demonstrated" that state mortgage lending laws "are effective in reducing predatory lending without reducing consumers' access to legitimate credit." *Id.* at 10 (footnote omitted). According to AARP, "the OCC sides with banks rather than consumers." *Id.* at 13. Preempting state consumer protection laws, AARP claims, "is unfair and unwise." *Id.* at 10.

In one sense, AARP's appeals to wisdom and fairness run counter to this Court's characterization of these factors as irrelevant to resolving state-Federal conflicts: "We cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy." *Franklin National Bank v. New York*, 347 U.S. 373, 378 (1954); *accord Ass'n of Banks in Ins. v. Duryea*, 270 F.3d 397, 408 (6th Cir. 2001) ("The fact that the state legislature enacted [the state law to protect] consumers does not, for that reason alone, preclude federal preemption"). Nonetheless, this Court should not be left with the impression that consumer protection concerns, relevant or not, are predominantly on the side of the petitioner.

The importance of credit in enabling people to better their lives cannot be overestimated. In the words of economist Muhammad Yunus, the 2006 winner of Nobel Peace Prize, "credit is the key that unlocks their humanity."[2]

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[2] Professor Yunus was honored for his pioneering efforts to establish microcredit systems for the poor in developing countries. Molly Moore, *Micro-Credit Pioneer Wins Peace Prize*, Washington Post, Oct. 14, 2006, at A1. His full quote on this point is as follows: "Poverty covers people

Yet, as both this and lower courts have recognized, in the context of mortgages and, more generally, of credit, measures aimed at protecting the public may very often do exactly the opposite. They restrict credit and raise its cost, harming the very consumers supposedly protected by them. Moreover, despite AARP's claim of support from empirical studies, there is a growing body of economic literature that demonstrates the anti-consumer nature of such consumer protection measures. This is yet another reason for concluding that the OCC's preemption of state regulation in this case properly furthers the National Bank Act's purposes of enabling national banks to provide the public with adequate access to credit. *See, e.g.*, 12 U.S.C. § 24; *Franklin National Bank*, 347 U.S. at 375.

II.

THERE IS GROWING JUDICIAL RECOGNITION OF THE FACT THAT CREDIT REGULATIONS AIMED AT PROTECTING CONSUMERS MAY ACTUALLY HURT THEM

Courts have frequently recognized that protecting a consumer from loan provisions designed to protect the interests of a creditor may actually hurt rather than help consumers over the long run. In *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982), this Court upheld a Federal Home Loan Bank Board (FHLBB)

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in a thick crust and makes the poor appear stupid and without initiative. Yet if you give them credit they will slowly come back to life. Even those who seemingly have no conceptual thought, no ability to think of yesterday or tomorrow, are in fact quite intelligent at the art of survival. Credit is the key that unlocks their humanity." Quoted in Diane Coyle, *The Weightless World: Strategies for Managing the Digital Economy* 79 (1997).

regulation preempting state laws restricting the enforcement of "due-on-sale" clauses, which allow a lender to seek immediate repayment of a mortgage loan upon the sale of the property by the borrower.

In doing so, this Court noted that the FHLBB had reasonably concluded, after economic analysis, that state laws restricting enforcement of due-on-sale clauses "'will reduce the amount of home-financing funds available to potential home buyers, and generally cause a rise in home loan interest rates'" at borrowers' expense. *Id.* at 168 (quoting the FHLBB's *Schott* Advisory Opinion); *accord id.* at 169 (citing risk that "flow of home loan funds ... will be reduced" and savings and loans' very solvency will be endangered).[3]

While this Court did not make its own independent judgment about whether permitting the enforcement of due-on-sale clauses was good for consumers, deferring to the FHLBB, it did observe that there was nothing "arbitrary or capricious" about the FHLBB's conclusion, which was supported by both analysis and rulings from a number of courts. *Id.* at 169.

Indeed, many other courts agreed with the FHLBB that imposing restrictions on the enforcement of due-on-sale clauses would harm the very consumers such restrictions purport to help, mortgage borrowers.

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[3] Similarly, analysts have found that this Court's decision in *Marquette National Bank v. First Omaha Serv. Corp.*, 439 U.S. 299 (1978), which held that the National Bank Act preempted state credit card interest rate ceilings except for those imposed by a national bank's home state, had clearly positive results for consumers and resulted in the democratization of credit markets in the United States. *See infra* at 15; Todd Zywicki, *The Economics of Credit Cards*, 3 Chapman L. Rev. 79, 147 (2000).

Williams v. First Federal Savings & Loan Ass'n of Arlington, 651 F.2d 910, 930 n. 47 (4th Cir. 1981), rejected challenges to the enforceability of a mortgage's due-on-sale clause without proof of impairment of security under Virginia's antitrust and common law. The court noted that such challenges might immediately benefit "a relative few" homeowners, but that they would cause far more harm in the future. In its words, they would "inexorably lead to an increase in interest rates" and "all future purchasers of homes in the end would suffer." The court pointed out that the purported "'beneficence'" of protecting borrowers from the clause is "'shortsighted," since this would "necessarily restrict, if not dry up, mortgage funds available to the next generation of borrowers.'" *Id., quoting Wellenkamp v. Bank of America*, 21 Cal.3d 943, 954, 148 Cal.Rptr. 379, 386 (Cal. 1978) (Clark, J., dissenting).

Similarly, the Massachusetts Supreme Judicial Court observed that enforcing due-on-sale clauses was good for consumers, since it "lowers the interest rate at which the bank is willing to loan money" by reducing its risks when interest rates fluctuate. *Dunware v. Ware Savings Bank*, 423 N.E.2d 998, 1001-02 (Mass. 1981). As a result, "Elimination of the [due-on-sale] clause 'will cause widespread hardship to the general home-buying public.'" *Id.* at 1004, *quoting FHLBB Advisory Opinion No.* 75-647, at 37 (July 30, 1975).

Many other state courts reached similar conclusions. *United Savings Bank Mut. v. Barnette*, 695 P.2d 73, 76 (Or. App. 1981) (noting "the substantial benefits that due-on-sale clauses have on interest rates and loan availability"); *Income Realty & Mortgage Inc. v. Columbia Savings & Loan Ass'n*, 661 P.2d 257, 261-63 (Colo. 1983) (restricting enforcement of due-on-sale clauses will "necessitate an increase in the interest rate of new loans"; "The due-on-sale clause was of benefit to both" lender and borrower, since "the borrowers

received a lower interest rate than they would have, if there had been no such clause"); *Martin v. Peoples Mutual Savings & Loan Ass'n*, 319 N.W.2d 220, 226-28 (Iowa 1982) ("economic and social consequences of nullifying the due-on-sale provisions" include "charging new borrowers a higher rate of interest than they would otherwise be required to pay"; *Occidental Savings & Loan Ass'n v. Venco Partnership*, 293 N.W.2d 843, 847, 849 (Neb. 1980) (if such clauses are not enforced, "ultimately, no one will be able secure satisfactory financing"; thus, "a 'due on sale' clause is not repugnant to public policy but, to the contrary . . . the clauses may favor the public interest"); *Lake v. Equitable Sav. & Loan Ass'n*, 674 P.2d 419, 422 (Idaho 1983) ("less money available to potential borrowers" if borrowers shielded from enforcement of such clauses); *Weiman v. McHaffie*, 470 So.2d 682, 684 (Fla. 1985) (restricting enforcement of the clause causes "shortage of mortgage money" for buyers); *Malouff v. Midland Federal Savings & Loan Ass'n*, 509 P.2d 1240, 1244-45 (Colo. 1973) (barring such clauses would "increase monthly payments and make the obtaining of such [mortgage] loans prohibitive to many people" (citation omitted)). Thus, it is no surprise that the courts in the "majority of jurisdictions" liberally enforce due-on-sale clauses while only a minority bars their enforcement under state common law. *Lake,* 674 P.2d at 423.

In short, it is well-recognized that credit regulations aimed at protecting consumers may actually hurt them, and it is entirely reasonable for federal bank regulators to take this risk into account in carrying out their mission of ensuring that federal financial institutions are able to provide an adequate flow of credit to consumers. It is thus not surprising that Congress has given the OCC the dual function of overseeing both national banks and the treatment that

those banks give to their customers.[4] AARP characterizes this as a conflict of interest for the OCC, and claims that the agency supposedly "sides with banks rather than with consumers." In fact, as indicated above, the protection of banks and consumers is inextricably intertwined, and the OCC's dual function is far likelier to produce a regulatory optimum than is Michigan's approach.

In this case, Michigan, consumer groups, and realtors ask the Court to reject preemption because it would supposedly harm consumers. Their position is not based on new findings. Rather, it is a replay of arguments unsuccessfully raised over two decades ago in *De la Cuesta*. *See Amicus Curiae Brief of the Consumers' Committee to Protect Mortgage Rights*, 1982 WL 60848 (March 26, 1982); *Amicus Curiae Brief of the National Association of Realtors in Support of Appellees*, 1982 WL 608495 (March 27, 1982); *Amici Curiae Brief of Michigan, et al.*, 1982 WL 608494 (March 29, 1982). Their arguments are as unpersuasive now as they were then.[5]

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[4] In the words of one GAO report, "OCC's mission focuses on the chartering and oversight of national banks to assure their safety and soundness and on fair access to financial services and fair treatment of bank customers." General Accounting Office, *OCC Preemption Rules* (Report GAO-06-387) at pg. 5 (April 2006) (available at www.gao.gov/new.items/d06387.pdf). As the report explains, "In addition to exercising its supervisory responsibilities under the National Bank Act, which include consumer protection, OCC enforces other consumer protection laws. They include the Federal Trade Commission Act or FTC Act, which prohibits unfair and deceptive practices, and the Federal Home Ownership and Equity Protection Act, which addresses predatory practices in residential mortgage lending. With respect to real estate lending, other consumer protection laws that national banks and their operating subsidiaries are subject to include, but are not limited to, the Truth in Lending Act, the Home Mortgage Disclosure Act, the Fair Housing Act, and the Equal Credit Opportunity Act." *Id.* at 6.

[5] AARP argues that, in "comparison to the federal government, states are more familiar, accessible, and accountable to their constituencies and are

III.

ECONOMIC STUDIES INCREASINGLY DEMONSTRATE THE HARMFUL EFFECTS OF CONSUMER CREDIT REGULATION

Economic studies demonstrate that consumers suffer as a result of consumer credit regulations. In the words of one study, in "the longer run, the costs of [consumer credit] regulation are passed on to consumers in one way or another." Richard L. Peterson, *The Costs of Consumer Credit Regulation* at 3 (Credit Research Center Reprint #13, 1979) (www.business.gwu.edu/research/centers/fsrp/pdf/Reprint13.pdf). *See, e.g.*, Mark Meador, *The Effects of Mortgagee Laws on Home Mortgage Rates*, 34 J. Econ. & Bus. 143 (1981) (concluding that borrower protection laws place upward pressure on the interest rates charged by lenders).

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better positioned to act as laboratories of experimentation in areas as fundamental as home lending." AARP brief at 6. But AARP itself is actively promoting its own model law for state mortgage regulation across the country. AARP, *Home Loan Protection Act: A Model State Statute*, www.aarp.org/research/legis-polit/legislation/ aresearch-import-174-D17346.html. Apparently, AARP's espousal of state experimentation is secondary to its own agenda for regulation

As for Consumers Union and the other consumer groups on the AARP brief, one legal commentator has noted such "groups have not joined the preemption debate" out of principle, but rather because they believe that state laws are a tool for goading Congress into action; "These groups do not actually want 50 different state laws that protect consumers in various lending situations to varying degrees. They would prefer a federal standard" that is the same for "all consumers" throughout the nation, but they believe that "state laws provide Congress with the necessary impetus to act." Mark Furletti, *The Debate Over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards*, 77 Temple L. Rev. 425, 449 (2004) (citing a Consumers Union lobbyist).

As one scholar noted, the due-on-sale clauses upheld against state regulation by this Court in *De la Cuesta* "contribute economic benefit to borrower and lender alike" by keeping interest rates down, fostering the "flow of funds" into state mortgage markets, and helping "to ensure the continued availability of the fixed-rate mortgage, a popular instrument from the borrower's perspective"; accordingly, federal preemption of state "restrictions on the enforcement of due-on-sale clauses benefits both lenders and borrowers." Eric J. Murdock, *The Due-on-Sale Controversy: Beneficial Effects of the Garn-St. Germain Depository Institution Act of 1982*, 1984 Duke L. J. 121, 137, 140 (1984); *see also* Richard T. Pratt & Tim S. Campbell, *An Economic Analysis of the "Due on Sale" Clause in California Mortgage Markets* 5 (Credit Research Center (CRC) Working Paper #14, Jan. 1979) (www.business.gwu.edu/research/centers/fsrp/pdf/Mono14.pdf) ("economic analysis of the 'due on sale' clause . . . demonstrates why unrestricted use of the clause is in the interest of both borrowers and lenders").[6]

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[6] See also Grant S. Nelson & Dale A. Whitman, *Congressional Preemption of Mortgage Due-on-Sale Law: An Analysis of the Garn-St. Germain Act*, 35 Hastings L.J. 241, 310 (1983) (arguments for restricting due-on-sale clauses are "not logical"); Thomas Kinzler, *Due on Sale Clauses: The Economic and Legal Issues*, 43 U. Pitt. L. Rev. 441, 460 (1982) ("mortgagors as a whole will benefit through enforcement of [the due on sale clause] because lenders will continue to offer a fixed rate mortgage" and "will be able to charge lower interest rates," and because enforcing them "insures a supply of mortgage funds for tomorrow's mortgages"); Alan J. Blocher, *Due-on-Sale in the Secondary Mortgage Market*, 31 Cath. U. L. Rev. 49, 95, 99 (1981) (barring enforcement of due-on-sale clause will drive up interest rates for future borrowers; "the costs will be borne most heavily by those on relatively fixed incomes, such as the elderly or low-income groups"; and the patchwork of state laws in this area restricting such clauses reduces "the supply of conventional mortgage funding"); Bartke & Tagaropulos, *Michigan's Looking Glass World of Due-on-Sale Clauses*, 24 Wayne L. Rev. 971, 1002 (1978) ("A question legitimately may be asked whether a consumer, who is protected to the point that he or she can no longer get home

This is especially true for the interest-rate ceilings contained in state usury laws. As a senior economist at the Federal Reserve noted, "The unanimous or near unanimous view of the profession" of economists is that "ceilings or controls of interest rates have been a bad idea for a long time and will continue to be a bad idea in the future."[7] "Nobel Laureate Milton Friedman spoke well for the entire profession in 1970 when he reported, 'I know of no economist of any standing . . . who has favored a legal limit on the rate of interest that borrowers could pay or lenders receive.'"[8]

Although interest rate ceilings are intended to help borrowers, they actually harm them, since "controls create credit shortages, they impede competition, they waste resources, and probably most tellingly, they do not work anyway."[9] They dry up the flow of credit to the low-income and high-risk borrowers they seek to help, forcing borrowers to turn to loan-sharks and disguised loans, such as installment purchases at inflated prices. *See, e.g.*, Christopher DeMuth, *The Case Against Credit Card Interest*

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financing because the sources of funds have dried out, is that much better off than before").

[7] Thomas Durkin, *An Economic Perspective on Interest Rate Regulation*, 9 Ga. St. U. L. Rev. 821, 837 (1993) (www.business.gwu.edu/research/centers/fsrp/pdf/Reprint22.pdf).

[8] *Id.* at 821 (quoting Milton Friedman, *Defense of Usury*, Newsweek, Apr. 6, 1970, at 79).

[9] *Id.* at 837. *See also Crafton, An Empirical Test of the Effect of Usury Laws*, 23 J.L. & ECON. 135, 140 (1980) (Usury laws lead to a decrease in mortgage loan origination); Nathan, *Economic Analysis of Usury Laws*, 10 J. BANK RES. 200, 204 (1980) ("[R]esearch indicates that usury restrictions have limited the flow of credit to mortgage markets."); Ostas, *Effects of Usury Ceilings in the Mortgage Market*, 21 J. FIN. 821, 831 (1976) (usury laws reduced mortgage loan volume).

Rate Regulation, 3 Yale Journal of Regulation 201, 221 (1986) ("By effectively segmenting the supply of credit and reducing the competition faced by the firms who are superior repricers, usury controls raise net costs of credit. This was the conclusion of one recent study which found that usury controls significantly reduced price competition between finance companies and banks," *citing A. Sullivan, Effects of Consumer Loan Rate Ceilings on Competition Between Banks and Finance Companies* 20-22 (1981) (CRC Working Paper No. 38); *see also* Michael E. Staten & Robert W. Johnson, *The Case for Deregulating Interest Rates in Consumer Credit* 7, 38, 48, 50 (CRC Monograph #31, 1995) (www.business.gwu.edu/research/centers/fsrp/pdf/Mono31.pdf).

As one economic study observed,

- "rate ceilings that are thought to 'protect' consumers do not protect consumers and do clear harm to those at the bottom of the economic ladder," since they "'reduce the number of loans made" and "are most harmful to citizens they were apparently designed to protect -- relatively poor credit risks.'"[10]

- "rate ceilings on loans" indirectly "heap distress on consumers" by cutting off credit and driving them to alternatives like pawnshops and loan sharks;[11] and

- "Restrictive rate ceilings on cash credit force lenders to deny credit to consumers who pose a high risk or desire only small amounts of credit. Those excluded consumers are typically young, have short-time on the

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[10] Staten & Johnson, *The Case for Deregulating Interest Rates in Consumer Credit* 7, 50 (quoting former Labor Secretary Robert B. Reich)

[11] *Id.* at 38.

> job, are renters, and are unskilled workers with relatively low incomes. Not only do ceilings ration customers out of the legal market, but they also drive smaller lenders from the market and thereby diminish competition."[12]

Thus, it was consumers who ultimately benefited from this Court's decision in *Marquette National Bank v. First Omaha Serv. Corp.*, 439 U.S. 299 (1978), which held that the National Bank Act preempted state credit card interest rate ceilings except for those imposed by the national bank's home state. *See, e.g.*, Todd Zywicki, *The Economics of Credit Cards*, 3 Chapman L. Rev. 79, 147 (2000) ("by eliminating archaic and largely ineffective usury restrictions, *Marquette* increased efficiency and competition in the credit card industry, made the market more responsive to consumer demand, and provided large benefits to consumers").

Similarly, state laws that limit creditor remedies against debtors, such as garnishment, increase interest rates, drive up the cost of credit, and reduce its availability to needy consumers. *See, e.g.*, Richard L. Peterson & James R. Frew, *Creditor Remedy Restrictions and Interstate Differences in Personal Loan Rates and Availability: A Supplementary Analysis* 1, 8 (CRC Working Paper #14, 1977) (www.business.gwu.edu/research/centers/fsrp/pdf/WP14.pdf) ("many restrictions on creditors' remedies are likely to reduce personal loan availability (per capita) and, to a lesser extent, increase personal loan finance rates"; for example, "restrictions on garnishment significantly affected the price and availability of consumer credit," leading to "significantly elevated finance company personal loan rates," while "prohibitions against confession of judgment clauses" were linked to "significant increases in loan rates" and "significant reductions in bank personal loan credit availability");

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[12] *Id.* at 48.

Richard L. Peterson, *The Impact of Creditors' Remedies on Consumer Loan Charges* 4, 7 (CRC Working Paper #15, 1977) (www.business.gwu.edu/ research/centers/fsrp/pdf/WP15.pdf) ("bank auto loan rates [were] significantly higher in states with the most restrictive creditor remedies," and "in every case a lack of restriction on (or prohibition against) a particular creditors' remedy was associated with lower loan rates"; for example, "State restrictions on attorney fee clauses are associated with 90 basis point increased in bank consumer loan rates," and restrictions on garnishment increase "consumer finance charges"; moreover, "restrictions on creditors' remedies also induce lenders to reduce their supplies of consumer credit -- both in the aggregate . . . and to the most risky borrower groups").[13]

The same is true of state laws aimed at so-called predatory lending. By placing added restrictions on high-interest loans, and increasing the liability risks of lenders who make them, they have many of the same unfortunate side-effects as usury laws. *See* Donald Lampe, *Wrong from*

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[13] *See also* Norman Geis, *Escape from the 15th Century: The Uniform Land Security Act*, 30 Real Prop. Prob. & Tr. J. 289, 300 (1995) ("Economists have predicted . . . that the increased cost of lending in the judicial foreclosure states will be reflected in an increased cost of mortgage borrowing"); *accord* Durham, *In Defense of Strict Foreclosure: A Legal and Economic Analysis*, 36 S.C. L. Rev. 461, 495-06, 499 (1985) (increasing obstacles to foreclosure harms rather than helps consumers); Anne Bradner, *The Secondary Mortgage Market and State Regulation of Real Estate Financing*, 36 Emory L. J. 971, 997 (1987) ("costs are largely a function of delays built into the system, and the delays [in foreclosure] harm both mortgagor and mortgagee"), *citing* Bauer, *Judicial Foreclosure and Statutory Redemption: The Soundness of Iowa's Traditional Preference for Protection Over Credit*, 71 Iowa L. Rev. 1, 9-10, 11-12 (1985); Note, *Foreclosures, Redemptions, and Homeowners*, 1975 U. Ill. L.F. 335, 358-61; Pedowitz, *Mortgage Foreclosure Under the Uniform Land Transactions Act (As Amended)*, 6 REAL EST. L.J. 179, 195 (1978); *Madway & Pearlman, Mortgage Forms and Foreclosure Practices: Time for Reform*, 9 Real Prop. Prob. & Tr. J. 560, 565 (1974).

the Start? North Carolina's "Predatory Lending" Law and the Practice vs. Product Debate, 7 Chapman L. Rev. 135, 145 (2004) (studies show that "the North Carolina [predatory lending] law's 'triggers' form usury ceilings on residential mortgage loans made after the effective date of the law").

Thus, economic analysis has found that such laws reduce the availability of credit to lower-income households while adding little to protections against consumer fraud. *See id.* at 144-45; Office of the Comptroller of the Currency, *Preemption Determination & Order*, 68 Fed. Reg. 46264, 46271 n.26 (Aug. 5, 2003) ("a growing body of evidence indicates that state anti-predatory lending laws are likely to restrict the availability of credit to subprime borrowers"); OCC Working Paper, *Economic Issues in Predatory Lending* at 2 (July 30, 2003) (www.occ.treas.gov/workingpaper.pdf) ("there is substantial empirical evidence that anti-predatory statutes can impede the flow of mortgage credit, especially to low-income and higher-risk borrowers, and that any reduction in predatory abuses resulting from these measures is probably achieved at the expense of many legitimate loans").[14]

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[14] *See also* Gregory Elliehausen & Michael Staten, *Regulation of Subprime Mortgage Products: An Analysis of North Carolina's Predatory Lending Law*, 29 J. of Real Estate Finance & Economics 411 (2004) (www.business.gwu.edu/research/centers/fsrp/pdf/RevisedWP66.pdf); Robert E. Litan, *Unintended Consequences: The Risks of Premature State Regulation of Predatory Lending* (American Bankers Association, 2002) at 15 (www.aba.com/NR/rdonlyres/D881716A-1C75-11D5-AB7B-00508B95258D/28871/PredReport200991.pdf) ("State and local laws [on predatory lending] threaten to dry up credit for the very same population about which critics of predatory lending are most concerned"; risk "discouraging the supply of credit to higher risk borrowers"; and "reduce overall lending to subprime borrowers"); OCC Working Paper, *Economic Issues in Predatory Lending* at 20 ("There is a good deal of empirical evidence to suggest that anti-predatory statutes impede the flow of mortgage credit, especially to low-income and higher-risk borrowers, and

For example, Georgia's predatory lending law "caused secondary market participants to cease purchasing certain Georgia mortgages and many mortgage lenders to stop making mortgage loans in Georgia," dramatically reducing the availability of credit. OCC, *Bank Activities and Operations: Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904, 1908 (Jan. 13, 2004); OCC Working Paper, *Economic Issues in Predatory Lending*, at 3, 20 (Fannie Mae and Freddie Mac stopped buying "high cost home loans" after the Georgia Fair Lending Act passed, and the law caused "the nation's seventh largest subprime originator to stop making all subprime loans in Georgia").

Less draconian statutes, such as North Carolina's predatory lending law, have also had negative effects on the availability of credit. "For example, studies of subprime lending activity in North Carolina before and after enactment of that state's anti-predatory lending law have shown a post-enactment decline in subprime mortgage originations of about 15%." OCC, *Preemption Determination & Order*, 68 Fed. Reg. at 46271 n.26, *citing* Keith D. Harvey & Peter J. Nigro, *Do Predatory Lending Laws Influence Mortgage Lending?, An Analysis of the North Carolina Predatory Lending Law*, 29 J. Real Est. Fin. & Econ. 435 (2004); Elliehausen & Staten, *Regulation of Subprime Mortgage Products: An Analysis of North Carolina's Predatory Lending Law*, 29 J. Real Est. Fin. & Econ. 411 (2004); *see also* OCC Working Paper, *Economic Issues in Predatory Lending* at 22 (Philadelphia predatory lending ordinance also found to have likely resulted in reduction in legitimate loans).

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any reductions in predatory abuses resulting from these measures if probably achieved at the expense of many legitimate loans").

AARP claims that such laws reduce predatory lending without reducing access to credit. *See* AARP Brief at 10. AARP's claims, however, are subject to serious dispute. A number of analysts have found that North Carolina's predatory lending law has in fact reduced the flow of credit to low-income borrowers. As a result of its passage, "creditors appear to have sharply restricted lending to higher-risk customers in North Carolina -- but not to customers in neighboring states or to lower risk customers in North Carolina -- after passage of the law." *Elliehausen & Staten*, 29 J. Real Est. & Fin. at 412. After the law's passage "significant declines [in mortgage loans] occurred only in North Carolina and only among the lower-income borrowers. Neither the higher-income borrowers in North Carolina nor borrowers in other states experienced significant declines." *Id.* at 429; *see also* OCC Working Paper, *Economic Issues in Predatory Lending* at 25 (declines were significant and "were found only in the higher-risk segment of the market"). Moreover, "the North Carolina statute did impede the flow of mortgage credit to higher-risk borrowers . . . at the expense of many legitimate loans." *Elliehausen & Staten*, 29 J. Real Est. & Fin. at 430; *see also* OCC Working Paper, *Economic Issues in Predatory Lending* at 2, 20 (any putative benefits of the law likely came "at the expense of many legitimate loans"); Keith D. Harvey & Peter J. Nigro, *Do Predatory Lending Laws Influence Mortgage Lending?, An Analysis of the North Carolina Predatory Lending Law*, 29 J. Real Est. Fin. & Econ. 435 (2004). In the words of one analyst, studies suggest "that the North Carolina 'predatory lending' law has led to a reduction in the availability of higher cost or 'subprime' mortgage loan credit in the State." Lampe, 7 Chapman L. Rev. at 144.[15]

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[15] Although a 2002 report from the Center for Responsible Lending claimed legitimate lending was unaffected, the "evidence presented [in it] d[id] not support, and often contradict[ed], the report's conclusions," since the report ignored important "borrower risk characteristics" to reach

While AARP faults the OCC for not preventing predatory lending, the agency does in fact enforce prohibitions against predatory lending, without using the counterproductive approach of many state regulators. *See* Robert E. Litan, *Unintended Consequences: The Risks of Premature State Regulation of Predatory Lending* (American Bankers Association, 2002) at 15, 34 (www.aba.com/NR/rdonlyres/D881716A-1C75-11D5-AB7B-00508B95258D/28871/PredReport200991.pdf) ("federal law already bans all or virtually all of the practices associated with predatory lending," and "recent enforcement activity indicates that the authorities are taking the problem very seriously").

The absence of large numbers of enforcement proceedings simply reflects the fact that it is not banks who are the primary sources of predatory lending. *See* OCC Working Paper at 7 ("There is little data suggesting that banks themselves are engaged in predatory lending to any significant degree"); *id.* at 4 (noting "scant evidence" of national bank involvement).

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its conclusions. *Elliehausen & Staten*, 29 J. Real Est. & Fin. at 414-15. Worse, it "excluded the largest category of subprime borrowers [that] represents the heart of the industry" from the study, eliminating most of the relevant data. OCC Working Paper at 19 (citing this and other "weaknesses in the data").

CONCLUSION

The decision below should be affirmed, because the OCC's interpretation of the statute promotes the purposes of the National Bank Act by enabling banks to meet the credit needs of their customers without being subjected to a hodgepodge of burdensome and wasteful state regulations.

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No. 05-1342

IN THE
Supreme Court of the United States

LINDA A. WATTERS, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES,
Petitioner,

v.

WACHOVIA BANK, N.A. AND WACHOVIA MORTGAGE CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF REALTORS® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of REALTORS® ("NAR")[2] is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. As such, NAR defends the interests of real estate professionals and real property owners throughout the United States.

Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. In pursuit of these objectives, NAR is concerned with a wide range of activities, including fair lending practices, consumer protection in the area of real estate loans, promotion of equal opportunity in housing, real estate licensing, neighborhood revitalization, housing affordability, and cultural diversity. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,500 local Associations of REALTORS®, and approximately 1.3 million REALTOR® and REALTOR-ASSOCIATE® members.

This case is important to NAR and its members. The decisions of the panel and of three other courts of appeals[3]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus* represents that counsel for all parties have consented to the filing of this brief. Petitioner has filed a letter with the Clerk granting blanket consent to any party filing an *amicus* brief in support of either petitioner or respondents, and a letter reflecting respondents' consent to the filing of this brief has been filed with the Clerk.

[2] REALTOR® is a federal registered collective membership mark used by members of NAR to indicate their membership status.

[3] *See National City Bank v. Turnbaugh*, No. 05-1647, 2006 WL 2294843 (4th Cir. Aug. 10, 2006) (to be reported at — F.3d —); *Wells*

affirming the Comptroller of the Currency's ("Comptroller") interpretation of 12 U.S.C. § 484 provide a significant competitive advantage — preemption of generally applicable state licensing and reporting requirements, as well as of related investigation and enforcement efforts by state authorities — to those state-chartered corporations owned by a national bank. The Comptroller's interpretation is not limited to the specific context of mortgage lending. It can be expected that national banks will assert that a decision affirming the Sixth Circuit will apply to every activity in which the Comptroller has found — or, in the future, finds — that a national bank can engage. Reversal of the decision below is essential to ensure the maintenance of a level playing field among state-chartered corporations with respect to all of the activities, including real estate brokerage, in which national banks can, or are actively seeking authority to, engage.

SUMMARY OF ARGUMENT

In the National Bank Act, Congress gave the Comptroller direct authority to examine national banks and, to ensure a complete examination of such banks, also authorized the Comptroller to examine the banks' affiliates. But Congress expressly limited the Comptroller's exclusive examination authority — known as its "visitorial powers" — to national banks and did not extend such exclusive authority with respect to the affiliates of national banks.

This case involves one type of national bank affiliate, known as an operating subsidiary. Although an operating subsidiary can engage only in activities that the national bank could engage in itself, an operating subsidiary is by definition a separate corporation that a national bank owns or controls. As a result, it is an affiliate, as that term is defined in the National Bank Act, and is not a national bank itself.

Fargo Bank N.A. v. Boutris, 419 F.3d 949 (9th Cir. 2005); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), *petition for cert. pending*, No. 05-431 (U.S. filed Sept. 30, 2005).

Nor can an operating subsidiary be treated as if it were a division or department of a national bank. Congress enacted and has amended the National Bank Act against the background of the settled corporate law principle that a parent corporation and its subsidiary are legally separate entities. Nothing in the National Bank Act suggests that Congress authorized the Comptroller to disregard such a basic tenet of corporate form.

For these reasons, the Comptroller has unlawfully concluded that the section of the National Bank Act that provides it with exclusive visitorial powers over national banks also preempts state authorities from exercising state-law visitorial powers over operating subsidiaries. The Comptroller's interpretation cannot be squared with the text of the National Bank Act and should be rejected at *Chevron*[4] step one.

The Comptroller's assertion of exclusive authority is also inconsistent with Congress's policy of competitive equality, as reflected in the text of the National Bank Act. The effect of the Comptroller's position is that a state-chartered corporation that becomes an operating subsidiary of a national bank obtains a significant competitive advantage over other state-chartered corporations — which remain subject to state "visitorial powers" laws of the type at issue here — even while maintaining the benefits of limited liability that flow from the separate corporate form. Indeed, the respondent here, Wachovia Mortgage Corporation, complied for six years with the same Michigan laws that it now claims are preempted as a result of a change in the identity of its parent corporation, from a bank holding company to a national bank.

If permitted to stand, the Comptroller's decision would vastly expand the preemption of state law, as that decision is not limited to the mortgage industry, but instead extends to every activity in which a national bank — now

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[4] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

or in the future — is permitted to engage directly. That result would have a deleterious effect on the real estate business, by tilting the competitive balance steeply in favor of such operating subsidiaries engaged in real estate activities free from state regulations applicable to others engaged in the business. The Court should find that the plain language of the National Bank Act precludes the Comptroller from creating a class of entity that is neither national bank nor national bank affiliate, but that has the dual advantages for its parent corporation of limited liability and the preemption of state laws that apply to its competitors.

ARGUMENT

I. THE COMPTROLLER'S ASSERTION OF EXCLUSIVE VISITORIAL POWERS OVER OPERATING SUBISIDIARIES CONFLICTS WITH THE PLAIN - LANGUAGE AND PRO-COMPETITIVE POLICY OF THE NATIONAL BANK ACT

In its January 2004 final rule, the Comptroller asserted that "the standards of section 484 apply to national bank operating subsidiaries" and, therefore, that state laws providing for "visitorial powers" over state-chartered corporations are "inapplicable to [a national] bank's operating subsidiary."[5] But, by its express terms, § 484 applies only to "national bank[s]," 12 U.S.C. § 484(a), and operating subsidiaries are not national banks. The Comptroller's attempt to expand the definition of "national bank," and thereby to extend § 484 to entities that are not

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[5] Bank Activities and Operations, 69 Fed. Reg. 1895, 1900-01 (Jan. 13, 2004) (codified at 12 C.F.R. § 7.4000). In reaching this conclusion, the Comptroller relied on its interpretive rule, released in 2001, which stated the Comptroller's view that "state laws apply to operating subsidiaries to the same extent as they apply to the parent national bank" because such subsidiaries are "the equivalent of departments or divisions of their parent [national] banks." Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 34,784, 34,788 (July 2, 2001) (codified at 12 C.F.R. Pts. 1, 7, and 23).

national banks, is precluded by the clear language of the statute. The Court therefore should reject the Comptroller's interpretation at *Chevron* step one,[6] just as the Court has done when other agencies have similarly sought to expand the reach of banking statutes beyond their plain terms.[7] The Court should also reject the Comptroller's interpretation because it conflicts with the policy of competitive equality in the National Bank Act by providing a significant competitive advantage to those state-chartered corporations that happen to be owned by a national bank.

A. Section 484 Authorizes The Comptroller To Exercise Visitorial Authority Over National Banks Only And Not National Bank Affiliates

In the National Bank Act, Congress assigned to the Comptroller the duty to "examine every national bank" and provided that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." 12 U.S.C. §§ 481, 484(a).[8] As a "[g]eneral rule," therefore, "[s]tate officials may not exercise visitorial powers with respect to national banks." 12 C.F.R. § 7.4000(a)(1).[9]

Congress also gave the Comptroller limited additional authority to conduct examinations of a national bank's

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[6] *See, e.g., Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004) (explaining that, in assessing an agency's interpretation of a statute it administers, the Court "first ask[s] whether Congress has directly spoken to the precise question at issue"; "[i]f so, courts, as well as the agency, must give effect to the unambiguously expressed intent of Congress") (internal quotation marks omitted).

[7] *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998) ("*NCUA*"); *Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361 (1986).

[8] *See, e.g., Guthrie v. Harkness*, 199 U.S. 148, 157-59 (1905) (describing the common-law concept of visitorial powers, incorporated into the National Bank Act, which refers to the "public right, existing in the state[,] for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers").

[9] *See, e.g.*, 12 C.F.R. § 7.4000(b) (listing exceptions to the general rule).

affiliates, which Congress defined broadly to "include *any* corporation, business trust, association, or similar organization" that a national bank, "directly or indirectly, owns or controls." 12 U.S.C. § 221a(b) (emphasis added). Thus, "in making the examination of any national bank," the Comptroller may "examin[e] . . . the affairs of all its affiliates," but only "as shall be necessary to disclose fully the relations between [the] bank and [its] affiliates and the effect of such relations upon the affairs of [the] bank." *Id.* § 481. This additional authority, therefore, is derivative of the Comptroller's authority to examine national banks. Congress did not give the Comptroller free-standing authority to examine *all* the affairs of national bank affiliates, let alone exclusive authority to examine those affiliates, as § 484 makes no mention of affiliates and references only national banks.

B. An Operating Subsidiary Is A National Bank Affiliate, Not A National Bank

In 1966, the Comptroller announced that a national bank may, as part of its "incidental powers . . . necessary to carry on the business of banking," 12 U.S.C. § 24 (Seventh), conduct such business through a separate corporation that the national bank controls.[10] Such corporations are known as "operating subsidiaries." Under the Comptroller's current regulations, an operating subsidiary is a state-chartered "corporation, limited liability company, or similar entity" that engages in only those "activities that are permissible for a national bank to engage in directly" and that is "controll[ed]" by a national bank. 12 C.F.R. § 5.34(e)(1)-(2).[11] Under the definitions in the National

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[10] *See* Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,459, 11,460 (Aug. 31, 1966) (codified at 12 C.F.R. § 7.10).

[11] A national bank's operating subsidiaries are distinguished from its financial subsidiaries, which are "any compan[ies] that [are] controlled by" the national bank "other than a subsidiary that . . . engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that

Bank Act, an operating subsidiary is a national bank affiliate and is not, itself, a national bank.

National banks and their affiliates are, in fact, distinct entities, formed in different ways and correspondingly subject to different regulatory requirements and regimes. A national bank is a "corporate entit[y] chartered not by any State, but by the Comptroller of the Currency." *Wachovia Bank v. Schmidt*, 126 S. Ct. 941, 944 (2006).[12] To obtain such a charter, "any number of natural persons, not less in any case than five," must form an "[a]ssociation[] for carrying on the business of banking" by "enter[ing] into articles of association" and "forward[ing] [those] to the Comptroller of the Currency." 12 U.S.C. § 21. The association also must "transmit[] to the Comptroller" an "organization certificate," which "shall specifically state," among other things, the "name assumed by such association," which "shall include the word 'national.'" *Id.* §§ 22, 23. The Comptroller is charged with "determin[ing] whether the association is lawfully entitled to commence the business of banking." *Id.* § 26. If the Comptroller, "upon a careful examination," finds that the association is so entitled, "the Comptroller shall give to [the] association a certificate . . . that [the] association is authorized to commence" the "business of banking." *Id.*

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govern the conduct of such activities by national banks." 12 U.S.C. § 24a(g)(3)(A). The enactment of this section led the Comptroller to narrow its definition of "operating subsidiary," which from 1996 through 2000 had included subsidiaries that engaged in activities "different from [those] permissible for the parent national bank." Rules, Policies, and Procedures for Corporate Activities, 61 Fed. Reg. 60,342, 60,351 (Nov. 27, 1996) (codified at 12 C.F.R. Pts. 3, 5, 7, 16, and 28); *see* Financial Subsidiaries and Operating Subsidiaries, 65 Fed. Reg. 12,905, 12,909 (Mar. 10, 2000) (codified at 12 C.F.R. Pt. 5).

[12] "National bank" is defined indirectly in the National Bank Act, which provides that "[t]he terms 'national bank' and 'national banking association' . . . [are] synonymous and interchangeable," 12 U.S.C. § 221, and separately sets forth the manner in which an entity becomes a national banking association, *see id.*, *e.g.*, §§ 21-24, 26-27.

§ 27(a).[13] "Every national bank[ ]" must then "subscribe to the capital stock of [a] Federal reserve bank." *Id.* § 282.

In contrast, operating subsidiaries do not enter into articles of association or organization certificates; there is no requirement that the name of an operating subsidiary include the word "national"[14]; and operating subsidiaries do not receive a certificate from the Comptroller, but instead are incorporated (or otherwise organized) under state law. In addition, an operating subsidiary is neither required nor eligible to subscribe to the capital stock of a Federal reserve bank. *See* 12 U.S.C. § 282. In sum, as the Ninth Circuit recognized, the fact that operating subsidiaries "are incorporated under a state's law" and "not directly chartered by the federal government" is an "irreducible difference between national banks and their operating subsidiaries." *Boutris*, 419 F.3d at 965.

For these reasons, an operating subsidiary is not a national bank; it is instead an "affiliate" of a national bank — a "corporation, business trust, association, or other similar organization" that a national bank, "directly or indirectly, owns or controls." 12 U.S.C. § 221a(b).

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[13] Alternatively, a state bank, "with the approval of the Comptroller of the Currency," may be "converted into a national banking association, with a name that contains the word 'national'"; upon receiving a "certificate" from the Comptroller, the converted bank "shall have the same powers and privileges, and shall be subject to the same duties, liabilities, and regulations, in all respects, as . . . associations originally organized as national banking associations." 12 U.S.C. § 35.

[14] Indeed, of the nearly 500 operating subsidiaries in existence as of December 31, 2005, only a handful have the word "national" in their name. *See* Comptroller of the Currency, *Annual Report of National Bank Operating Subsidiaries that Do Business Directly with Consumers, by Operating Subsidiary Name* (Dec. 31, 2005), *available at* http://www.occ.treas.gov/consumer/Report - 2006 for Op Sub pdf.pdf.

C. The National Bank Act Must Be Interpreted Consistent With Basic Principles Of Corporate Law, Under Which An Operating Subsidiary Cannot Be Treated As If It Were A Division Or Department Of A National Bank

Despite the fact that an operating subsidiary does not meet the statutory requirements for being a national bank, the regulations challenged here "treat[] each operating subsidiary . . . as if it were a national bank itself." *Boutris*, 419 F.3d at 961. The Comptroller — implicitly acknowledging that operating subsidiaries are not, in fact, national banks — asserts instead that operating subsidiaries are the "equivalent of departments or divisions of their parent banks." 66 Fed. Reg. at 34,788.[15] Either way, the Comptroller's treatment of operating subsidiaries as legally indistinguishable from their parent national banks cannot be squared with the basic principles of corporate law against which Congress enacted and has amended the National Bank Act.

The National Bank Act, like all statutes, must be interpreted consistent with the "basic tenet of American corporate law" that a "corporate parent" and its "subsidiaries" are "distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-75 (2003). The Court has required Congress to "indicat[e] that [it] intended . . . to depart from the general rules regarding corporate formalities," *id.* at 476, and has recognized that, "against this venerable common-law backdrop, . . . congressional silence is audible," *United States v. Bestfoods*, 524 U.S. 51, 62 (1998).

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[15] *Accord* 69 Fed. Reg. at 1900 (asserting that operating subsidiaries are, "in essence, no more than incorporated departments of the bank itself"). The Comptroller has also asserted that "[c]ourts have consistently treated operating subsidiaries as equivalent to national banks in determining their powers and status under Federal law," but in none of the cases cited was the court called upon to address the distinction between the national bank and its operating subsidiaries. *See id.* at 1900 & n.45.

Applying these "elementary principles of corporate law" in other contexts, the Court has held that a corporation cannot obtain the benefits of the Foreign Sovereign Immunities Act of 1976 merely because it is a subsidiary of a corporation owned by a foreign state. *Dole Food*, 538 U.S. at 477. Similarly, the Court has refused to read into the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 an implicit "reject[ion] [of] th[e] bedrock principle" that a corporate parent is not liable "simply because its subsidiary is subject to liability." *Bestfoods*, 524 U.S. at 62.

The Court has also relied on the "existence of . . . a distinct corporate entity" — even where the corporate form "was doubtless adopted solely to secure . . . some advantage under the . . . law[]" — to hold that jurisdiction over a parent corporation was not obtained by service on a subsidiary corporation. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335 (1925). In *Cannon*, it was undisputed that the "defendant wanted to have business transactions with persons resident in North Carolina, but for reasons satisfactory to itself did not choose to enter the state in its corporate capacity" and, instead, "employ[ed] a subsidiary corporation." *Id.* at 336. Finding that this "corporate separation, though perhaps merely formal, was real," the Court held that the parent corporation did not subject itself to suit in North Carolina merely because it used "a subsidiary corporation as the instrumentality for doing business therein." *Id.* at 336-37. Applying the same principles, this Court held that Whitney Central National Bank was not subject to suit in New York, despite the bank's "large," "varied, important and extensive" "New York business," because the bank itself "was not in New York" but had its New York business "transacted for it by its correspondent[]" banks. *Bank of America v. Whitney Cent. Nat'l Bank*, 261 U.S. 171, 172-73 (1923).

The text of the National Bank Act makes it "evident . . . that Congress was aware of settled principles of corporate law and legislated within that context," with no indication

that Congress intended to override those settled principles. *Dole Food*, 538 U.S. at 474.[16] Indeed, the Comptroller has previously — and correctly — recognized that, "as a legal matter," the "use of a separate subsidiary structure . . . distinguish[es] the subsidiary's activities from those of the parent bank." 61 Fed. Reg. at 60,354. One of the reasons why a national bank may prefer to conduct business through an operating subsidiary rather than through an actual division or department of the national bank itself is to "separat[e] particular operations of the bank from other operations" and thereby limit the liability of the parent national bank for actions of the operating subsidiary. 31 Fed. Reg. at 11,460. Having done so, the national bank must accept the consequences that, under the text of the National Bank Act, follow from use of the separate corporate form.[17]

D. The Comptroller's Assertion Of Exclusive Visitorial Authority Over Operating Subsidiaries Violates The Plain Language Of The National Bank Act

As demonstrated above, an operating subsidiary is not a national bank itself or a part of a national bank. It is, instead, a separate corporate entity that falls within the statutory definition of a national bank affiliate. In the National Bank Act, Congress clearly distinguished between national banks, on the one hand, and their

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[16] *Compare, e.g.*, 12 U.S.C. § 221a(b)(1)-(3) (defining an "affiliate" of a national bank based on the ownership or control of "voting shares," "stock ownership," or the composition of the board of directors of "any corporation, business trust, association, or other similar organization") *with Dole Food*, 538 U.S. at 474 (finding that Congress "legislated within th[e] context" of "settled principles of corporate law" where the statute "refer[red] to the ownership of 'shares'" and "to a 'separate legal person, corporate or otherwise'").

[17] A national bank that prefers to have particular business operations subject to the exclusive visitorial powers of the Comptroller under § 484 may do so by engaging in that activity through a department or division of the bank, rather than through a separately organized subsidiary.

affiliates, on the other hand, giving the Comptroller largely exclusive visitorial powers over the former, but only partial, derivative, and concurrent visitorial authority over the latter. The text of the statute does not establish, or permit the Comptroller to create, a third class of entities — part state-chartered corporation, part national bank — and thereby to provide national banks with the best of both worlds: limited liability and preemption of state law. The Court, therefore, should strike down the Comptroller's interpretation of § 484 at *Chevron* step one, as it has in other cases where federal regulators sought to expand the statutory definition of the financial institutions they regulate.

For example, in *Dimension Financial*, the Court rejected the Federal Reserve Board's effort to expand the statutory definition of "bank" in the Bank Holding Company Act of 1956 to include "nonbank banks." As the Comptroller has attempted to do here, the Board there "promulgated rules providing that nonbank banks offering the functional equivalent of traditional banking services would . . . be regulated as banks," based on the Board's view that such equivalent treatment furthered the "purpose" of the Bank Holding Company Act. 474 U.S. at 364, 373. The Court rejected the Board's effort at *Chevron* step one, finding that "no amount of agency expertise" could cause these nonbank banks to fall within the statutory definition of "bank." *Id.* at 368, 373. The Court also held that the "purpose" of the Act was to be determined "with reference to the plain language of the statute" and that the Board, therefore, "has no power to correct flaws that it perceives in the statute" but instead "is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute." *Id.* at 373-74. That is because the "breadth of [the Board's] regulatory power rests on the Act's definition of the word 'bank.'" *Id.* at 365.

Similarly, in *NCUA*, the Court rejected the agency's attempt to expand the scope of the membership permitted in a single federal credit union. Where Congress had

provided that membership in a credit union "shall be limited to groups having a common bond of occupation or association," 12 U.S.C. § 1759 (1994), the NCUA interpreted that section to permit a single credit union to be "composed of wholly unrelated employer groups, each having its own distinct common bond." 522 U.S. at 484. As a result of this revised interpretation, credit unions were able to "expand[] [their] operations considerably by adding unrelated employer groups to [their] membership." *Id.* The Court, however, rejected the NCUA's interpretation, finding that "Congress has made it clear that the *same* common bond of occupation must unite each member of an occupationally defined federal credit union" and that "the NCUA's contrary interpretation is impermissible under the first step of *Chevron*." *Id.* at 500.

The Court should reach the same determination here. The Comptroller's position that operating subsidiaries are the functional equivalents of departments or divisions of national banks does not change the facts that Congress limited § 484 to "national bank[s]" and that operating subsidiaries are separate corporate entities that are affiliates, not divisions or departments, of national banks. The Comptroller's interpretation of § 484, therefore, must be rejected because "no amount of agency expertise — however sound may be the result — can make the words" "national bank" mean "operating subsidiary." *Dimension Fin.*, 474 U.S. at 368.

E. The Comptroller's Assertion Of Exclusive Visitorial Authority Over Operating Subsidiaries Violates The Policy Of Competitive Equality In The National Bank Act

The Comptroller's claim that the "standards of section 484 apply to national bank operating subsidiaries," 69 Fed. Reg. at 1900, also conflicts with Congress's "deliberate[]" decision, in the National Bank Act, to "settle[] upon a policy intended to foster competitive equality," *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 131 (1969) (internal quotation marks omitted). Under the Comptroller's

regulations, Wachovia Mortgage is freed from a number of generally applicable requirements, including state registration, payment of registration fees, and submission of annual financial statements to the state commissioner. Nor, on the Comptroller's view, would it be subject to the investigatory and enforcement powers of the state commissioner with respect to those obligations. *See* Pet. App. 2a n.1 (listing preempted state laws).[18] The thousands of other mortgage brokers licensed and registered in Michigan, however, continue to be bound by those rules and, therefore, are placed at a competitive disadvantage, contrary to the federal policy of competitive equality.

The competitive disadvantage is especially pronounced on the facts here. For six years, Wachovia Mortgage operated under the same state-law requirements applicable to all other mortgage brokers in Michigan.[19] During that time, Wachovia Mortgage was owned by a bank holding

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[18] Notwithstanding the common-law definition of visitorial powers, set forth in *Guthrie*, 199 U.S. at 157-59, and other decisions, the Comptroller has claimed "exclusive . . . authority" to "[e]nforc[e] compliance with any applicable federal or *state laws* concerning" a national bank's or its operating subsidiaries' "activities authorized or permitted pursuant to federal banking law." 12 C.F.R. § 7.4000(a)(2)-(3) (emphasis added); *see id.* § 7.4006. That is, the Comptroller has asserted that its visitorial powers, as interpreted in these regulations, preclude States from enforcing against national banks and their operating subsidiaries even those state laws — such as state anti-discrimination laws — that are not preempted by federal law, and that only the Comptroller may act to enforce those state laws. *See, e.g., Office of Comptroller of Currency v. Spitzer*, 396 F. Supp. 2d 383 (S.D.N.Y. 2005), *appeal pending*, No. 05-5996 (2d Cir.). The question whether the Comptroller has overstepped its authority in this regard as well is not presented here.

[19] *See* JA 19a (Compl. ¶¶ 20-21) (alleging that the predecessor of Wachovia Mortgage, First Union Mortgage Corporation, "registered" in Michigan under state law to "mak[e] first mortgage loans" "on March 27, 1997," and "remained continuously registered" thereafter, but that it "became a wholly-owned operating subsidiary of [Wachovia] national bank effective January 1, 2003," and on "April 3, 2003, notified the [Michigan] Commissioner[]" of its view that it was "no longer subject to the requirements of the Michigan Licensing Act").

company[20] and had a national bank as a sister subsidiary. It was not until January 2003 that it switched its parent from the bank holding company (Wachovia Corporation) to the national bank (Wachovia Bank, N.A.), thereby becoming a "direct operating subsidiary" of the national bank. JA 19a (Compl. ¶ 21). Undoubtedly, this change in corporate structure was designed primarily — if not solely — to enable Wachovia Mortgage to obtain a competitive advantage over competitors that would remain subject to state requirements and state enforcement, while maintaining for Wachovia Bank, N.A. and Wachovia Corporation the benefits of operating through a legally separate entity, chartered under state law.[21]

In addition, the inconsistency of the Comptroller's position with Congress's policy of competitive equality enshrined in the National Bank Act is not limited to the mortgage industry. The Comptroller's view extends to *every* activity that a national bank can take pursuant to its "incidental powers." 12 U.S.C. § 24 (Seventh). This Court has held that the Comptroller "has discretion to authorize [national banks to undertake] activities beyond those specifically enumerated" in § 24 (Seventh), though the "exercise of the Comptroller's discretion . . . must be kept within reasonable bounds."[22] Therefore, whenever the Comptroller exercises that discretion to add to the list of activities permitted for a national bank, it expands the

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[20] A "bank holding company" is defined as, among other things, "any company which has control over any bank." 12 U.S.C. § 1841(a)(1).

[21] Under the Comptroller's regulations, the national bank need not even own a majority of the "voting (or similar type of controlling) interest" in a state-chartered corporation for that company to qualify as an operating subsidiary. 12 C.F.R. § 5.34(e)(2). The Comptroller has interpreted this regulation to find that national bank ownership of only 10 percent of the voting shares in a corporation is sufficient to render that company an operating subsidiary. *See* Comptroller of the Currency, Conditional Approval No. 646, 2004 WL 1656647, at *1 (June 28, 2004).

[22] *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995).

industries in which national banks, by the simple expedient of rechristening their subsidiary, state-chartered corporations as "operating subsidiaries," can obtain a competitive advantage over other corporations engaged in such activities — namely, exemption from state registration and reporting requirements, and related state investigation and enforcement. Therefore, if the Comptroller's equation of national banks with their operating subsidiaries were upheld, the only limitation on the preemption of state laws would likely be the outer boundary of the Comptroller's authority to interpret the "incidental powers" clause in § 24 (Seventh).[23]

This possibility is of particular concern to NAR because of recent efforts by the banking industry and its federal regulators to permit national banks, bank holding companies, and their subsidiaries to engage in real estate brokerage.[24] Although NAR maintains that such extensions of authority would be unlawful because real estate brokerage is neither an "incidental power[] . . . necessary to carry on the business of banking," 12 U.S.C. § 24 (Seventh), nor "financial in nature or incidental to such financial activity," *id.* § 1843(k)(1), those questions are not presented here.[25] NAR, however, has a substantial interest

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[23] *See id.* (stating that a conclusion that "operating a general travel agency" is an incidental power necessary to carry on the business of banking "*may* exceed th[e] bounds" of the Comptroller's discretion) (emphasis added).

[24] *See, e.g.*, Bank Holding Companies and Change in Bank Control, 66 Fed. Reg. 307 (proposed Jan. 3, 2001) (joint proposed rule by the Board of Governors of the Federal Reserve System and the Department of the Treasury that would permit bank holding companies and financial subsidiaries of national banks to engage in real estate brokerage); Comptroller of the Currency, Interpretive Letter #1044 (Dec. 5, 2005) (authorizing national bank to develop mixed-use building containing, among other things, four floors of residential condominiums, without expressly conditioning approval on the bank utilizing an unaffiliated real estate broker to sell condominium units), *available at* http://www.occ.treas.gov/interp/dec05/int1044.pdf.

[25] Congress has passed appropriations riders that preclude the use of funds "to finalize, implement, administer, or enforce . . . the pro-

in ensuring that all of its members, and all industry participants, compete on a level playing field.[26]

II. THE COMPTROLLER'S PREEMPTION OF STATE REGULATION CANNOT BE JUSTIFIED AS AN INTERPRETATION OF NATIONAL BANKS' "INCIDENTAL POWERS"

Apparently recognizing that § 484, which applies only to "national bank[s]," cannot be interpreted to apply to operating subsidiaries, the court below asserted that the Comptroller did "not expand the definition of 'national bank' as Congress used it in section 484," but instead "interpret[ed] [the scope of] a national bank's 'incidental powers.'" Pet. App. 8a. The Second Circuit similarly asserted that the Comptroller "does not purport to define the term 'national bank,' as used in § 484, to include an 'operating subsidiary,'" but instead "interpreted a

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posed rule relating to the determination that real estate brokerage is an activity that is financial in nature or incidental to a financial activity." Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. J, § 646, 117 Stat. 11, 428, 474 (2003); *see* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, § 538, 118 Stat. 3, 279, 346 (2004); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, Div. H, § 519, 118 Stat. 2809, 3199, 3267 (2004); Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, Div. A, § 718, 119 Stat. 2396, 2493 (2005); *see also* H.R. 5576, 109th Cong. § 818 (June 14, 2006). Congress is also considering legislation that would amend the statutory definitions to preclude such a ruling. *See* H.R. 111, 109th Cong. (Jan. 4, 2005); S. 98, 109th Cong. (Jan. 24, 2005).

[26] *Cf. NCUA*, 522 U.S. at 493-94 (finding that "competitors of federal credit unions" are within the zone of interests protected by the Federal Credit Union Act based on their "interest in limiting the markets that federal credit unions can serve" and the fact that "the NCUA's interpretation has affected that interest by allowing federal credit unions to increase their customer base").

national bank's 'incidental powers.'" *Burke*, 414 F.3d at 316.[27] That position is untenable.

First, the Comptroller expressly based its conclusion that state regulation of operating subsidiaries is preempted based on its view that "the standards of section 484 apply to national bank operating subsidiaries to the same extent as their parent national bank." 69 Fed. Reg. at 1900. Similarly, a January 2003 Interpretive Letter took the position that, "pursuant to 12 U.S.C. § 484, State regulatory authorities do not have the right to exercise visitorial powers" over "national bank operating subsidiaries conducting mortgage lending and servicing activities."[28] The Ninth Circuit likewise recognized that the Comptroller "conclu[ded] that § 484(a) . . . foreclose[d] the exercise of [visitorial powers] by the states," and erroneously found that interpretation to be "eminently permissible." *Boutris*, 419 F.3d at 964 (internal quotation marks omitted). Thus, contrary to the conclusion of the court below, the Comptroller itself explicitly identified § 484(a) as the basis for it's action. The Court "may not enforce [an agency's] order by applying a legal standard the [agency] did not adopt," and the Comptroller's "error in interpreting" the term "national bank" in § 484 "precludes [the Court] from enforcing its" decision. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 721 (2001).

Second, and in any event, the "incidental powers" clause does not give the Comptroller additional authority to preempt state exercise of visitorial powers, beyond that set forth in § 484, which is limited to national banks. NAR does not dispute the Comptroller's conclusion that a national bank's incidental powers include the use of a

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[27] *See also Turnbaugh*, 2006 WL 2294843, at *4-*5 (finding the Comptroller's claim of preemption to be a permissible interpretation of the incidental powers clause).

[28] Comptroller of the Currency, Interpretive Letter #958, at 6 (Jan. 27, 2003), *available at* http://www.occ.treas.gov/interp/mar03/int958.pdf.

separate, state-chartered corporate subsidiary to undertake activities that the national bank could carry out on its own behalf. Nor does NAR dispute that a state law purporting to prohibit national bank ownership of an operating subsidiary would be preempted by the Comptroller's interpretation of a national bank's incidental powers, though there is no plausible claim that the Michigan laws at issue here — with which Wachovia Mortgage complied for six years before switching its corporate parent — rises to the level of an effective prohibition on ownership of an operating subsidiary.[29]

But the fact that "'using an operating subsidiary is a legitimate power granted to national banks'" does not mean, as the court below concluded, that "'§ 484 provides the [Comptroller] with ample authority to preempt states from exercising visitorial powers over the subsidiary.'" Pet. App. 8a-9a (quoting *Burke*, 414 F.3d at 316). The plain text of § 484 — which is expressly limited to "national bank[s]" — precludes that conclusion, as does the fact that § 24 (Seventh) "concerns the incidental powers of national banks, not the extent of the [Comptroller's] regulatory authority." *Boutris*, 419 F.3d at 961.

Third, the Comptroller's assertion of exclusive visitorial authority over operating subsidiaries also cannot be defended as a regulation of national banks' exercise of their incidental powers that was promulgated pursuant to the Comptroller's "authori[ty] to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a; *see Boutris*, 419 F.3d at 961. As an initial matter, this is not the language Congress uses to confer general rulemaking authority on an agency. Instead, when Congress intends to "give[] an agency broad power to enforce all provisions of [a] statute," *Gonzales v.*

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[29] *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996) ("Th[e] history [of national bank legislation] is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law.").

Oregon, 126 S. Ct. 904, 916 (2006), it says so explicitly. Thus, Congress gave the Federal Communications Commission authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." 47 U.S.C. § 201(b).[30] Section 93a also stands in contrast to the Comptroller's general rulemaking authority — conferred in other statutory provisions using Congress's standard language — over national banks' authority to act as trustees and to implement the Emergency Banking and Bank Conservation Act.[31] Section 93a, therefore, cannot be read to provide the general rulemaking authority that would be necessary (even though not sufficient) to authorize the Comptroller to preempt States from applying their generally applicable regulations to state-chartered corporations that happen to be owned or controlled by a national bank as an operating subsidiary.[32]

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[30] *See also, e.g.*, 7 U.S.C. § 12a(5) (authorizing the Commodity Futures Trading Commission "to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of this chapter"); *id.* § 87e(a) ("The Secretary [of Agriculture] is authorized to . . . prescribe such rules, regulations, and instructions, as the Secretary deems necessary to effectuate the purposes or provisions of this chapter."); 15 U.S.C. § 717*o* ("The [Federal Energy Regulatory] Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.").

[31] *See* 12 U.S.C. § 92a(j) ("The Comptroller of the Currency is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein."); *id.* § 211(a) ("The Comptroller of the Currency may prescribe such rules and regulations as the Comptroller may deem necessary to carry out the provisions of th[e] [Emergency Banking and Bank Conservation] Act.").

[32] In *Conference of State Bank Supervisors v. Conover*, 710 F.2d 878 (D.C. Cir. 1983) (per curiam), the D.C. Circuit found that § 93a permitted the Comptroller to promulgate regulations that "preempt those state laws that conflict with his responsibility to ensure the safety and

In any event, even an agency with broad rulemaking authority is limited by the specific substantive provisions of the statute. *See, e.g., Dimension Fin.*, 474 U.S. at 374 (holding that the Federal Reserve Board's "rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute"). Here, Congress authorized the Comptroller to "examine every national bank" and also to "examin[e] . . . the affairs of all its affiliates," but only to the extent necessary to investigate fully the national bank. 12 U.S.C. § 481. Nor did Congress give the Comptroller exclusive visitorial authority over national bank affiliates — a term Congress defined broadly and that includes, among others, operating subsidiaries, *see id.* § 221a(b) — instead limiting the Comptroller's exclusive authority to "national bank[s]." *Id.* § 484(a). Congress thus determined that a State's exercise of visitorial powers over a national bank's affiliates is consistent with, and "does not prevent or significantly interfere with the national bank's exercise of its powers" under, the National Bank Act. *Barnett Bank*, 517 U.S. at 33. The Comptroller's conclusion that any exercise of visitorial powers by a State over an operating subsidiary necessarily "prevent[s] or significantly interfere[s] with [a] national bank's" ability to utilize that subsidiary, *id.*, conflicts with that clear congressional determination. The plain language of the statute, therefore, precludes the Comptroller from using its limited rulemaking authority to assert exclusive authority over entities that are not national banks.

For the same reasons, the Comptroller's position is not aided by its regulation providing that an "operating subsidiary conducts activities . . . pursuant to the same authorization, terms and conditions that apply to . . . its

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soundness of the national banking system," *id.* at 885. The scope of preemptive authority the Comptroller has claimed here, however, goes far beyond that necessary "to ensure the safety and soundness of the national banking system."

parent national bank." 12 C.F.R. § 5.34(e)(3).[33] The Comptroller has asserted that this regulation must mean "that state laws apply to operating subsidiaries to the same extent as they apply to the parent national bank." 66 Fed. Reg. at 34,788; *see Boutris*, 419 F.3d at 962 (adopting this argument). But the Comptroller cannot, by piling regulation upon regulation, avoid the plain language of § 484, which applies only to national banks. In any event, the Comptroller places too much weight on the "same . . . terms and conditions" language in its regulation, because operating subsidiaries are not subject to all of the same terms and conditions as their parent national banks — among other things, they are not obligated to subscribe to the capital stock of a Federal reserve bank and need not include the word "national" in their name. As the Court recognized in another case involving the National Bank Act, "[i]t is a strange argument that permits [the Comptroller] to pick and choose what portion of the law binds him." *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).

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[33] As noted above, from 1996 to 2000, the Comptroller's regulations permitted operating subsidiaries to engage in activities prohibited to national banks, and the Comptroller promulgated the current regulation to conform to the narrower definition implicit in the Gramm-Leach-Bliley Act. *See supra* note 11. The current regulation, therefore, was not promulgated with any preemptive intent, but instead with the intent to conform an overbroad regulation to the dictates of the governing statute.

CONCLUSION

The judgment of the court of appeals should be reversed.

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No. 05-1342

IN THE

Supreme Court of the United States

LINDA A. WATTERS, COMMISSIONER, MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES,

Petitioner,

v.

WACHOVIA BANK, N.A., AND WACHOVIA MORTGAGE CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF NATIONAL CITY BANK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Amicus curiae respectfully submits this brief in support of Respondents pursuant to Supreme Court Rule 37.3.[1] We urge the Court to affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF INTEREST

Amicus National City Bank ("NCB"), federally chartered since 1865, engages in the business of banking nationwide, subject to the exclusive regulation and oversight of the federal government. NCB's wholly owned operating subsidiaries, First Franklin Financial Corporation ("First Franklin") and National City Mortgage Company ("NCMC"), now service and fund mortgages originated by NCB, also on a nationwide basis. In recent years, state and local governments have imposed their own regulatory and oversight requirements on First Franklin and NCMC, despite the fact that, as operating subsidiaries of a national bank, they are supervised and overseen by federal authorities.

National City Bank has an interest in avoiding duplicative, burdensome and often conflicting regulation which imposes significant compliance costs, limits the financial products that it and its operating subsidiaries are able to offer, interferes with consumer welfare, and undermines the long-standing congressional commitment to a uniform nationwide system of banking. To that end, National City Bank and its operating subsidiaries have challenged state-imposed requirements in California, Maryland, and New Jersey. *See Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005); *Nat'l City Bank of Ind. v. Turnbaugh*, 463 F.3d 325 (4th Cir. 2006); *Nat'l City Bank of Ind. v. Bakke*, No. Civ. A. 3-04-3914 (SRC), 2005 WL 3544960 (D.N.J. Dec. 22, 2005).

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amicus curiae*, and their consent letters are on file with the Clerk's Office.

SUMMARY OF ARGUMENT

National City Bank, like other national banks and their operating subsidiaries, is subject to comprehensive and exclusive federal supervision and oversight, consistent with the congressional commitment to a uniform national banking system. Increasingly, state and local governments, are attempting to intrude upon this federal prerogative. Precluded by statute from exercising authority over national banks, state and local authorities have turned their sights to the operating subsidiaries of national banks, in an effort to accomplish indirectly what they cannot do directly—subject the business of banking to their own parochial rules.

For the national banks and their operating subsidiaries, compliance with the varied and often conflicting state and local requirements comes at a significant cost, over and above the costs incurred in complying with federal obligations. State and local assertions of authority prove costly to consumers who ultimately bear costs arising from additional compliance obligations. These efforts further harm consumers by eventually limiting the banking products that national banks and their operating subsidiaries can offer. Faced with the burdens of added supervision, national banks can and do take back functions from their operating subsidiaries. This effectively eliminates state oversight, but it also eliminates the substantial efficiencies gained through the use of operating subsidiaries.

At the same time, state and local efforts to assert authority over national banks and their operating subsidiaries provide no real benefit to consumers. Federal examiners, located on site in national banks and their operating subsidiaries, oversee and examine banking operations not only for safety and soundness but also to ensure compliance with the many federal consumer protection statutes, as required by Congress. This robust system, with day-to-day oversight and both informal and formal enforcement mechanisms, provides floor to ceiling protection for consumers. The substantial

costs of state and local oversight, the lack of any benefits, and the interference with the congressionally mandated uniform operation of the national banking system, render state and local authority over national banks and their operating subsidiaries not simply unnecessary but also ill-advised.

ARGUMENT

National City Bank ("NCB"), subject to exclusive federal authority, is one of many national banks that utilize operating subsidiaries in the performance of its functions. Treated on a consolidated basis with its operating subsidiaries for federal regulatory and reporting purposes, NCB has experienced first-hand the substantial interference and difficulty that arise when states and even local governments attempt to impose their own authority. *Amicus* NCB therefore can provide valuable insight into the costs imposed by state and local regulation over its operating subsidiaries, costs that are borne not only by the national banks and their operating subsidiaries but also—and significantly—by consumers.

I. CONGRESS VESTED THE OCC WITH EXTENSIVE AND EXCLUSIVE VISITORIAL AUTHORITY OVER NATIONAL BANKS TO ENSURE THE STABILITY AND SECURITY OF THE BANKING SYSTEM

Federal visitorial authority over national banks is far-reaching and exclusive. Governance by a single, uniform set of rules long has enabled national banks to safely and soundly exercise their central role in the national economy, whether directly or through their wholly-owned operating subsidiaries. State oversight is prohibited with respect to the national banks themselves. When imposed on their operating subsidiaries, state authority not only negatively affects the operating subsidiaries, it also seriously interferes with and threatens the ability of national banks to perform their essential task.

A. The Federal Government's Visitorial Authority Is The Broad Power To Supervise And Oversee The Business Of Banking

Congress long ago vested the federal government with extensive authority over national banks, conferring on it broad "visitorial powers." National Bank Act of June 3, 1864, c. 106, § 54, 13 Stat. 116, *codified at* 12 U.S.C. §§ 481-84 ("1864 Act"). At common law, "visitation" was a significant power, with corporations "subject to visitation in order to maintain their good government and secure their adherence to the purposes of their institution." Roscoe Pound, *Visitorial Jurisdiction Over Corporations in Equity*, 49 HARV. L. REV. 369, 371 (1936). Visitation was intended to help detect and correct improper corporate conduct, because "corporations being composed of individuals, subject to human infirmities, are liable, as well as private persons, to deviate from the end of their institution. The law, therefore, has provided, that there shall somewhere exist a power to visit, inquire into, and correct all irregularities and abuses in such corporations, and to compel the original purposes . . . to be faithfully fulfilled." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 673 (1819) (citing William Blackstone, COMMENTARIES 480 (1769)).

When Congress enacted the National Bank Act in 1864, it conferred on the federal government similarly broad "visitation" authority to oversee the national banking system, adapting the concept to the realm of national banks. Congress thus mandated "an examination of the affairs of the association," by examiners empowered to "examine [bank] officers and agents [under] oath" and required "to make a full and detailed report of the condition of the association to the comptroller." 1864 Act § 54. Congress "made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him . . . for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers," and "to correct all abuses of authority, and to nullify all irregular

proceedings." *Guthrie v. Harkness*, 199 U.S. 148, 158-59 (1905) (internal quotation marks omitted).

The National Bank Act today continues to vest sweeping visitorial authority in the federal government, through the Office of the Comptroller of the Currency ("OCC"). 12 U.S.C. §§ 24 (Seventh), 481, 484(a). Modern visitorial authority includes the right and duty to "examine every national bank," as well as "the affairs of all of its affiliates . . . as shall be necessary to disclose fully the relations between such bank and such affiliates and the effect of such relations upon the affairs of such bank." *Id.* § 481; 12 C.F.R. § 5.34(e)(3). Indeed, the "chief duty" of OCC examiners is to "ascertain that the statutory requirements and restrictions enacted by Congress, and administrative regulations adopted thereunder, are being complied with, and that the lending and investment policies of the bank, and its operating procedures, are such as to minimize the dangers to the banking system." S. Doc. No. 82-123, Pt. 2, Ch. VI, at 901 (1952). Bank examiners accomplish this statutory purpose by subjecting the national banking system—including national bank operating subsidiaries—to virtually "day-to-day surveillance," rendering examination authority "perhaps the most effective weapon of federal regulation of banking." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 329 (1963).

B. The Federal Government's Visitorial Authority Over National Banks Is Exclusive

Congress did not stop with according the federal government these far-ranging and specific elements of visitation. Rather, Congress went on to declare that this authority exclusively is the province of the federal government.

Under the common law, both in England and in the United States, the term "visitation" carried the connotation of exclusivity, contemplating only a single source of visitation for an institution. *See, e.g., Dartmouth Coll.*, 17 U.S. at 673-

74; *Guthrie*, 199 U.S. at 156. Congress continued this concept in the National Bank Act, conferring on the federal government exclusive visitorial authority over national banks. Congress did this not only by using the term "visitorial" and specifying its various elements in describing the federal government's authority over national banks, but also by expressly prohibiting any other authority from visiting national banks. Thus, the National Bank Act explicitly provided that national banks "shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the courts of law and chancery." 1864 Act § 54.[2]

Construing the Act, this Court has recognized that "[i]t was [Congress's] intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation." *Guthrie*, 199 U.S. at 159. As the Court further has stated, "[we] are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation." *Easton v. Iowa*, 188 U.S. 220, 232 (1903). Rather, because "[t]he National Bank Act . . . constitutes by itself a complete system for the establishment and government of National Banks," *Deitrick v. Greaney*, 309 U.S. 190, 194 (1940) (internal quotation marks omitted), national banks are "necessarily subject to the paramount authority of the United States." *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896).

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[2] Powers "vested in the courts of justice" referred to "inherent judicial powers, [without which] § 484 could have been construed as depriving the courts of the power to, for example, compel a national bank to produce books and records in connection with statutorily authorized litigation against the bank." Howard N. Cayne & Nancy L. Perkins, *National Bank Preemption: The OCC's New Rules Do Not Pose A Threat To Consumer Protection Or The Dual Banking System*, 23 ANN. REV. BANKING & FIN. L. 365, 381-82 (2004); *see* 12 C.F.R. § 7.4000(b)(2).

Exclusive federal authority over national banks is an essential component of a national banking system. It provides "uniformity," so that the banking system is "substantially the same in Washington, in New York, in Boston, and in Chicago," rather than one subject to "complications and differences" under the laws of different states. Cong. Globe, 38th Cong., 1st Sess. 1873 (1864) (remarks of Sen. Sumner). Without exclusive federal authority, states "might impose limitations and restrictions as various and as numerous as the States [themselves]." *Easton*, 188 U.S. at 229. Exclusive federal authority also is crucial given the "key role" of banks in "the national economy," that "banks do not merely deal in, but are actually a source of, money and credit," and that banks are "the intermediaries in most financial transactions." *Philadelphia Nat'l Bank*, 374 U.S. at 326. Without exclusivity, confusion would necessarily result from control possessed and exercised by two independent authorities, *id.*, and "national banks [would be] expose[d] . . . to the hazard of unfriendly legislation by the States . . . ." *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 413 (1874). Thus, the "entire body of the [National Bank Act], emphasize[s] that which the character of the system implies—an intent to create a national banking system co-extensive with the territorial limits of the United States, and with uniform operation within those limits." *Talbott v. Bd. of Comm'rs of Silver Bow County*, 139 U.S. 438, 443 (1891).

While the language of the National Bank Act has changed slightly since its enactment, it continues to mandate exclusivity. Today, the Act provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized." 12 U.S.C. § 484(a). Exclusive federal control of national banks, and the uniformity and other protections that it confers, remain the rule.

C. The Federal Government's Exclusive Visitorial Authority Over National Banks Necessarily Reaches National Bank Operating Subsidiaries

The essential principles undergirding Congress' unwavering commitment to exclusive federal authority over national banks apply with equal force to the operating subsidiaries of national banks. It long has been established that national banks can create and utilize operating subsidiaries in carrying out "the business of banking," 12 U.S.C. § 24 (Seventh), a power expressly endorsed by Congress in the Gramm-Leach-Bliley Act ("GLB Act"). Pub. L. No. 106-102, Title I § 121(a)(2), 113 Stat. 1338, 1373-74 (1999), *codified at* 12 U.S.C. § 24a(g)(3). Speaking directly to the activities engaged in by operating subsidiaries, the Senate Report accompanying the GLB Act acknowledged that "national banks are authorized directly to make mortgage loans and engage in related mortgage banking activities. Many banks choose to conduct these activities through subsidiary corporations. Nothing in this legislation is intended to affect the authority of national banks to engage in bank permissible activities through subsidiary corporations, or to invest in joint ventures to engage in bank permissible activities with other banks or nonbank companies." S. Rep. No. 106-44 (1999), *available at* 1999 WL 266803, at *8.

National banks establish operating subsidiaries for varied reasons, including convenience, efficiency, and flexibility. "The operating subsidiary stems from the commonsense notion that national banks can carry out all incidental banking powers as specified by Congress, and sanctioned by the courts, either directly or, if more convenient to the bank, through a separately incorporated entity." William B. Glidden, *The Regulation of National Banks' Subsidiaries*, 40 BUS. LAW. 1299, 1303 (1985). Operating subsidiaries aid banks in "controlling operations costs, improving effectiveness of supervision, [providing for] more accurate determination of profits, decentralizing management

decisions[, and] separating particular operations of the bank from other operations." Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,459-01, 11,460 (Aug. 25, 1966).

The operating subsidiary structure is advantageous because, among other reasons, it allows a national bank to focus the subsidiary, with its separate sale force, processing system, and business model, on a particular product line such as residential mortgage lending. Operating subsidiaries are "convenient," *see* Glidden, *supra*, 40 BUS. LAW. at 1303, providing substantial flexibility in organizing a corporate structure that both protects the safety and soundness of the national bank and permits the bank to respond to customer demand for products and services. For NCB and other banks, "whether to conduct business through operating subsidiaries or, instead, through subdivisions of the bank itself is thus essentially one of internal organization." *Wells Fargo Bank*, 419 F.3d at 960.

Operating subsidiaries essentially function as extensions of national banks. By statute, these subsidiaries can engage only in activities that national banks may engage in directly, "subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. § 24a(g)(3)(A). Consistent with that requirement, this Court and other federal courts routinely have subjected operating subsidiaries to the same treatment under the federal banking laws as their parent national banks. *See, e.g., NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995) (NBA authorized operating subsidiary to sell annuities); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 409 (1987) (operating subsidiary subject to federal branching restrictions); *Am. Ins. Ass'n v. Clarke*, 865 F.2d 278, 281 (D.C. Cir. 1988) (NBA authorized operating subsidiary to sell bond insurance).

Indeed, with respect to visitorial authority over national banks, Congress requires the OCC to examine "the affairs of

all of [the national bank's] affiliates . . . as shall be necessary to disclose fully the relations between such bank and such affiliates and the effect of such relations upon the affairs of such bank." 12 U.S.C. § 481; *see* 12 C.F.R. § 5.34(e)(3). For that reason, operating subsidiaries are treated as if they are the bank for regulatory purposes, with operating subsidiaries "normally supervised on a consolidated basis along with the parent bank. For supervisory purposes, the bank and its operating subsidiaries are viewed as a single economic entity." United States Office of the Comptroller of the Currency, Related Organizations, Comptroller's Handbook at 64 (OCC Aug. 2004) (footnote omitted). Thus, the OCC oversees banks by reference to "business line[s]," applying the same law whether banking "activities are conducted directly or through an operating subsidiary." *Id.*

Examples of "business line" examination abound. Statutory dividend and lending limits are applied to a parent national bank and its operating subsidiaries on a consolidated basis. *See, e.g.*, 12 U.S.C. §§ 56, 60, 84, 371d, 12 C.F.R. § 5.34(e)(4)(i). Likewise, the assets and liabilities of operating subsidiaries are consolidated with those of the parent bank for accounting and regulatory reporting purposes. *See* 12 C.F.R. §§ 5.34(e)(4)(i), 223.3(w). Given the reasons for the creation of operating subsidiaries, their limited range of activities, and their treatment for legal and regulatory purposes, the need for exclusive federal visitorial authority with respect to national banks is equally applicable to the operating subsidiaries of national banks.

II. NATIONAL BANKS AND THEIR OPERATING SUBSIDIARIES ARE SUBJECT TO COMPREHENSIVE AND RIGOROUS VISITATION BY THE OCC

Consistent with the statutory provisions governing the scope and extent of exclusive visitorial authority, NCB and its operating subsidiaries experience first-hand the "day-to-day surveillance of the American banking system."

Philadelphia Nat'l Bank, 374 U.S. at 329. For NCB and its operating subsidiaries, First Franklin and NCMC, the OCC exercises its visitorial authority not simply through periodic examinations but through embedded OCC examiners, physically present on a daily basis at the Bank. Working out of a suite of offices at NCB's headquarters in Cleveland, Ohio, a staff of at least eighteen federal examiners is on-site and dedicated to reviewing NCB's operations. OCC on-site staff at NCB usually swells to twenty-four or more for certain examinations.

These federal examiners provide intensive, seamless and continuous oversight of the full scope of NCB's operations, including those of its operating subsidiaries. *See* 12 U.S.C. § 481. These embedded examiners are present day in and day out at NCB, fully familiar with its operations, functions and processes, and fully proficient with its products. As a result, federal examiners are in a unique position to detect any inconsistencies, problems, or emerging patterns meriting review and correction, as well as to investigate any matters brought to their attention by state authorities or consumers. *See infra* at 12.

While smaller national banks and their operating subsidiaries do not necessarily have full-time resident OCC examiners, they too are subject to comprehensive oversight, including the same "full scope, on-site examination," 12 U.S.C. § 1820(d)(1), usually on an annual or more frequent basis, with limited statutory exceptions. *Id.* § 1820(d)(4); *see also* United States Office of the Comptroller of the Currency, Bank Supervision Process, Comptroller's Handbook at 4 (OCC April 1996) ("Bank Supervision Handbook"). These examinations are conducted by examiners housed in sixty OCC field offices spread across the country, who travel to and often remain at the banks for the duration of the examinations.

The OCC's intensive scrutiny of national banks, large and small, and their operating subsidiaries, does not depend

solely on the work done by embedded examiners. Examiners working off site with full access to bank information systems and reports subject national banks and their operating subsidiaries to further oversight, and are called upon to participate in examinations, either on-site or remotely, as needed. In addition to the safety and soundness examination in which the OCC analyzes NCB's (as well as all other national banks') finances, operations, management and compliance with national banking laws, *see* Bank Supervision Handbook at 26, the OCC conducts a wide variety of targeted examinations, dispatching many more examiners to reside on site at NCB and other national banks during the course of these examinations. If the OCC perceives a level of potential risk posed by a bank's operations and finances, the intensity level of the examination is elevated. *Id.* at 26-27. In addition, the OCC regularly conducts examinations of bank information systems and trust departments, *id.* at 6-7, and, at its discretion, can order examinations of particular products and services. *Id.* at 4.

OCC examiners also conduct examinations of compliance with consumer protection statutes on a continuous three-year cycle for large banks like NCB and its operating subsidiaries. For smaller banks, OCC examines compliance with consumer protection laws at least once every three years. *Id.* at 3, 5. Of the 1,800 examiners employed by the OCC, more than 300 spend all or part of their time enforcing bank compliance with consumer protection laws. *See* United States Office of the Comptroller of the Currency, *Comptroller Calls Preemption a Major Advantage of National Bank Charter*, NEWS RELEASE 2002-10 (Feb. 12, 2002), *available at* http://www.occ.treas.gov/ftp/release/2002-10.doc (last visited Nov. 3, 2006). In addition, the OCC solicits from state regulators information on national bank and operating subsidiary compliance with consumer protection laws, and the OCC's Customer Assistance Group ("CAG") processes more than 70,000

complaints and inquiries from customers of national banks and their operating subsidiaries each year. The CAG maintains and analyzes a database of these complaints and inquiries, used by examiners "to identify banks, activities and products that require further review or investigation," often giving rise to guidance issued by the OCC. United States Government Accountability Office, OCC Consumer Assistance: Process Is Similar To That Of Other Regulators But Could Be Improved By Enhanced Outreach, No. GAO-06-293, at 22 (U.S. Gov't Accountability Off. Feb. 2006). In addition, the CAG provides relief to consumers; in 2004 alone it returned more than $4 million in fees, charges, and other relief to national bank and operating subsidiary customers. *See* United States Office of the Comptroller of the Currency, 2004 Report of the Ombudsman at 29 (OCC Dec. 2004).

By congressional mandate, the OCC is required to enforce federal consumer protection laws including the Federal Trade Commission Act, 15 U.S.C. § 57a(f)(2); Truth in Lending Act, 15 U.S.C. § 1607(a)(1)(A); Fair Credit Reporting Act, 15 U.S.C. § 1681s(b)(1)(A); Equal Credit Opportunity Act, 15 U.S.C. § 1691c(a)(1)(A); the Electronic Funds Transfer Act, 15 U.S.C. § 1693o(a)(1)(A); and Fair Debt Collection Practices Act, 15 U.S.C. § 1692l(b)(1)(A). While the OCC often obtains voluntary compliance, *see infra* at 14-15, where needed it has initiated enforcement proceedings. Thus, in 2000, following a year-long investigation, the OCC found Providian National Bank liable for engaging in a pattern of deceptive practices in connection with the marketing of subprime credit cards. The OCC directed Providian to cease a number of unfair and deceptive practices prohibited by, *inter alia*, the FTC Act, and ordered Providian to pay at least $300 million in restitution to consumers harmed by those practices. *See In re Providian Nat'l Bank*, OCC Consent Order No. 2000-53 (June 28, 2000), *available at* http://www.occ.treas.gov/ftp/release/2000% 2D49b.pdf (last visited Nov. 3, 2006).

The OCC has initiated other consumer protection enforcement actions against national banks and their operating subsidiaries. *See, e.g.*, *In re Household Bank (SB), N.A.*, OCC Formal Agreement No. 2003-17, *available at* http://www.occ.treas.gov/ftp/eas/ea2003-17.pdf; *In re ABN AMRO Mortgage Group, Inc.*, OCC Stipulation & Consent Order No. 2005-162, *available at* http://www.occ.treas.gov/ftp/eas/ea2005-162.pdf; *In re First Horizon Home Loan Corp.*, OCC Stipulation & Consent Order No. 2005-78, *available at* http://www.occ.treas.gov/ftp/eas/ea2005-78.pdf; *In re Homeowners Loan Corp.*, OCC Agreement No. 2005-142, *available at* http://www.occ.treas.gov/ftp/eas/ea2005-142.pdf (all last visited Nov. 3, 2006). Congress also requires the OCC to enforce non-preempted state consumer protection law. *See* Riegle-Neal Interstate Banking and Branching Efficiency Act, 12 U.S.C. § 36(f)(1)(B). Indeed, in addition to directing Providian National Bank to cease practices that violated the FTC Act, the OCC also ordered Providian to cease violations of California unfair business laws. *See supra*, OCC Consent Order No. 2000-53.

In examining national banks and their operating subsidiaries, OCC examiners have broad authority under the statute. They are authorized not only to review documents, books, and records, but also to "administer oaths and affirmations, to take or cause to be taken depositions." 12 U.S.C. §§ 1818(n), 481. OCC examiners also are empowered to issue, revoke, quash, or modify "subpoenas and subpoenas duces tecum." *Id.* Significantly, while OCC examiners have broad enforcement authority, it rarely is invoked, due in large part to the fact that "recommendations by the agencies concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings." *Philadelphia Nat'l Bank*, 374 U.S. at 330.

Voluntary compliance, the prevailing practice in the industry, is in large part a unique by-product of the constant

presence of examiners in the banks. If examiners identify a problematic trend at a particular bank, they are in a position to seek an agreement from the bank to take action to correct the problem. At the end of an examination, the OCC reviews with bank management its conclusions and recommendations, and asks the bank to commit to correcting "all material deficiencies noted during the examination." Bank Supervision Handbook at 39. For NCB and other large national banks, OCC examiners discuss their findings and recommended corrective actions with the board of directors at least once a year. *Id.* at 40. The OCC provides a written report on its examination, and an examination summary is provided to the board at least once during each examination cycle. *Id.* at 41. Thus, the OCC visitation system functions as an early warning system enabling national banks to take corrective action before a problem ripens.

Voluntary compliance also occurs, in part, because "[t]he agencies' potent alternative of formal enforcement proceedings usually insures such voluntary compliance." *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 210, 218 (E.D.N.Y. 1979); *see also Philadelphia Nat'l Bank*, 374 U.S. at 330 (OCC's "panoply of sanctions" encourages national banks to correct problems identified during a bank examination). A failure to take corrective action comes with real and significant consequences for national banks and their operating subsidiaries. If a bank does not comply with the "recommendations and suggestions of the Comptroller, based on [the] examination" within 120 days, the OCC is authorized to publish its examination report, 12 U.S.C. § 481, and the threat of publication alone can compel compliance, given bank need and commitment to maintaining public confidence. The OCC has recourse to substantially stronger enforcement mechanisms as well, including the authority to impose civil penalties, *id.* §§ 93(b), 1818(i)-(j), order restitutionary payment, *id.* § 1818(b)(6)(A), issue cease and desist orders, *id.* § 1818(b)-(c), and prohibit from banking any bank director, officer, or "any other person participating

in the conduct of the affairs of [a national bank]" who violates a rule, regulation or the terms of a cease and desist order, or participates in unsound or unsafe business practice. *Id.* § 1818(e), (f), (g). As a last resort, the OCC can revoke a bank's charter. *Id.* § 93(a).

All of this federal oversight comes at a considerable cost to NCB and its operating subsidiaries. Changes in law require significant expenditures of time and money to retool specialized systems to track compliance. In addition, NCB and other national banks must provide special reports to the OCC, including detailed "condition reports" that analyze the financial condition and performance of national banks and their operating subsidiaries in key areas reviewed by the OCC (such as capitalization and liquidity), 12 U.S.C. § 161, and "call reports" on more specialized topics. *Id.* NCB and its operating subsidiaries employ a centralized, dedicated, full-time compliance staff of 102 people whose sole function is to design, implement and oversee policies or procedures that ensure bank and operating subsidiary compliance, and provide the OCC with compliance, financial risk and other information. In addition to this compliance staff, NCB has more than 300 full-time employees assigned to various business units ensuring day-to-day compliance with applicable banking laws and regulations.

III. IMPOSITION OF STATE AUTHORITY OVER NATIONAL BANKS AND THEIR OPERATING SUBSIDIARIES UNNECESSARILY BURDENS THE BUSINESS OF BANKING AND INJURES COMPETITION

In recent years, state regulators have attempted, with greater frequency, to assert their own visitorial authority over certain activities conducted by national banks and their operating subsidiaries.

Despite the long-standing recognition of the pre-emptive force of the National Bank Act, some states have attempted to exercise authority over the national banks themselves. In

other instances, states assert visitorial authority over the operating subsidiaries of national banks, thereby attempting to do indirectly what they cannot do directly. Licensing laws recently enacted in California, for example, subject operating subsidiaries to state examinations on par with those mandated by federal law. *See* Cal. Fin. Code §§ 50302(a), 50315, 50318, 50320 to 50325 (authorizing Commissioner of Corporations to examine any licensed entity; impose significant penalties; issue cease and desist orders; seek injunctions or restraining orders; criminally prosecute entities in violation of the law; and censure or suspend officers).

At the same time, even local authorities have issued their own laws concerning the practices of national banks and their operating subsidiaries. Banks in California, for example, recently found themselves subject to *municipal* ordinances prohibiting the assessment of ATM fees to non-depositors. *See Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 564 (9th Cir. 2002). Washington, D.C. imposed its own anti-predatory lending laws on lenders, *see* D.C. Code Ann. §§ 26-1114, 26-1151.01 *et seq.*, and the Ohio Bureau of Motor Vehicles expressly prohibited banks and their operating subsidiaries from using one particular method of selling reclaimed leased vehicles. *See* Preemption Opinion, 66 Fed. Reg. 23,977-01, 23,978 (May 10, 2001).

State and local efforts to exercise extensive visitorial powers subject national banks and their operating subsidiaries to requirements that vary from state to state and even city to city. *See, e.g.*, Bank Activities & Operations; Real Estate Lending & Appraisals, 69 Fed. Reg. 1,904-01, 1,908 (Jan. 13, 2004). The differing and often conflicting laws impose significant harm on consumers, by raising compliance costs of national banks and their operating subsidiaries as well as by limiting the types of products and services available to consumers.

A. Subjecting National Banks And Operating Subsidiaries To State And Local Authority Creates Unnecessary Regulatory Burdens And Significant Compliance Costs, Ultimately Injuring Consumers

When banks and their operating subsidiaries are required to comply with varying state and local laws and visitorial authority, the cost of engaging in the business of banking rises significantly. In recent years, California, Maryland, and Georgia passed laws concerning residential mortgage lending which, if enforced, would impose dramatically increased compliance costs on NCB and its operating subsidiaries, First Franklin and NCMC.

The California Residential Mortgage Lending Act ("CRMLA"), Cal. Fin. Code §§ 50000 *et seq.*, for example, prohibited lenders from charging interest on residential first mortgages for more than one day prior to the recording of a mortgage deed. *See Wells Fargo Bank*, 419 F.3d at 955 (citing Cal. Fin. Code § 50204(o)). Under that law, in August 2002 the California Commissioner ordered NCMC to review every mortgage loan that it had made going back to August 2, 2000, the effective date of the CRMLA. The costs of complying with the Commissioner's order would have been extraordinary—between 150,000 and 180,000 mortgage loans were initiated during the relevant period. Retrieval and review of the associated files could only be done manually, at an estimated cost in excess of $4 million. When NCMC objected, the Commissioner instituted an administrative proceeding to revoke NCMC's license to operate in California. *Id.* at 956.

Other state laws would require operating subsidiaries, including those of NCB, to create compliance systems tailored to each state, in addition to the nationwide systems required for compliance under the National Bank Act. Maryland's Mortgage Lender Law ("MMLL"), Md. Code Ann., Com. Law § 12-105(b)(4), limiting prepayment

penalties, *see Nat'l City Bank*, 463 F.3d at 328 n.1, and Georgia's Fair Lending Act ("GFLA"), Ga. Code Ann. §§ 7-6A-1 *et seq.* (2002), setting interest rates, fees, and credit terms would impose significant compliance costs. *See* Preemption Determination and Order, 68 Fed. Reg. 46,264-02 (Aug. 5, 2003).

Until recently, NCB dedicated a staff of approximately sixty-two full-time employees solely to ensuring that its operating subsidiaries were in compliance with all the different state and local lending laws. And NCB is not alone. When California enacted a law mandating a minimum payment warning for credit cards, six other national banks estimated that together they would have to spend $44 million to come into and maintain compliance in the first year alone. *See* 69 Fed. Reg. at 1,908 n.24. And when anti-predatory lending laws were enacted in the District of Columbia, Georgia, Pennsylvania, and New York, one national bank estimated that it would need 250 programming days to bring just one of several computer systems into compliance with these laws. *See id.*

Each time another state enters the regulatory fray, national banks and their operating subsidiaries incur a new set of compliance costs. On top of these ongoing costs are those associated with responding to the specific requests of regulators in various states for varying information. Ultimately all these costs affect the price at which mortgages and other financial products can be provided to consumers.

B. Subjecting National Banks And Operating Subsidiaries To State And Local Authority Limits The Products Available To Consumers

State attempts to assert visitorial authority impose additional harm by limiting the products that operating subsidiaries can offer consumers. The MMLL, for example, limited prepayment penalties that NCB, First Franklin, and NCMC could charge on adjustable rate mortgage loans. *See Nat'l City Bank*, 463 F.3d at 328 & n.1. Prohibited from

including prepayment penalties, NCB's operating subsidiaries could not continue to offer these loans without threatening their own and NCB's safety and soundness, thus withdrawing from consumers this highly popular form of mortgage which made home ownership more widely available.

Similarly, the GFLA's array of requirements, including its imposition of liability on the assignees of loans, severely limited the secondary market for residential mortgage loans made by NCB and its operating subsidiaries, making it highly difficult for the bank and its operating subsidiaries to continue providing these products to consumers. *See, e.g.*, 68 Fed. Reg. at 46,279 n.92. Rating services like Standard & Poors and Moody's Investor Services refused to rate securities that included these loans, and refused to include these loans in rated structured financial transactions. Other investors simply stopped buying the loans. *See, e.g.*, Preemption Letter, 68 Fed. Reg. 8,959-02, 8,963 (Feb. 26, 2003). These acts seriously limited the ability of NCB and its operating subsidiaries to assign loans, thereby limiting their ability to respond to consumer need with appropriate banking products. If national banks cannot assign loans, "banks will be required hold [them] to maturity . . . [and] hold capital against the full amount of the [] loans," making fewer other products available. 68 Fed. Reg. at 46,278 n.90.

The costs of state and local regulation and visitation of national banks and their operating subsidiaries are, in sum, considerable. With respect to the substantive limitations that states seek to impose on operating subsidiaries, *see* Brief of AARP as *Amicus Curiae* In Support of Petitioner, at 5 ("AARP Brief"), the decision of states to enact and enforce such laws are made without consideration of the possible effect on bank safety and soundness nor on the costs of eliminating nationwide uniformity of law, both overriding concerns of the National Bank Act. And the cost of state action brings with it marginal if any benefit for consumers.

Significantly, far from showing "little interest in ensuring fairness to consumers," as is claimed, AARP Brief at 3, the OCC subjects NCB as well as other national banks and their operating subsidiaries, to exacting and continuous oversight and enforcement of the law, including—consistent with the congressional mandate—consumer protection laws. *See supra* at 12-13. The OCC's intensive supervision of national banks and their operating subsidiaries also provides the unique ability to detect and root out any potential problems before they take root, and so provides another assurance of bank safety and soundness. Federal law and enforcement leaves no vacuum of enforcement, protection, or oversight, whether as to the national banks or their operating subsidiaries. As a result, permitting states to exercise their own visitorial authority over operating subsidiaries would provide no added benefit, consumer or otherwise, nor would it otherwise enhance the substantial protections already in place.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LINDA A. WATTERS, Commissioner, Michigan Office of Insurance and Financial Services,
Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND U.S. CONFERENCE OF MAYORS, JOINED BY THE CONFERENCE OF STATE BANK SUPERVISORS, AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Amici will address the following question:

> Whether preemptive regulations issued by the Office of the Comptroller of the Currency, which divest the States of all power to regulate state-chartered, non-bank operating subsidiaries of national banks, exceed the OCC's statutory authority and therefore do not qualify for *Chevron* deference.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amicus* Conference of State Bank Supervisors is the national association of state officials who regulate state-chartered banks, non-bank mortgage lenders, and other providers of financial services. Throughout this nation's history, the States have enacted and enforced laws designed to protect consumers against abusive and unfair practices by financial service providers. In particular, the States have taken a leading role in combating predatory mortgage lending practices. *Amici* therefore submit this brief to assist the Court in its resolution of the case.

STATEMENT

The decision below upheld regulations issued by the OCC, which declare that the OCC possesses exclusive authority to regulate state-chartered, non-bank corporations that are operating subsidiaries of national banks.[2] The core of the OCC's preemption claim is set forth in 12 C.F.R. § 7.4006. Section 7.4006 asserts that, unless otherwise provided by federal law, "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." The OCC adopted § 7.4006 in 2001—35 years after the OCC first permitted national banks to establish operating subsidiaries. In 1966, the OCC recognized that operating subsidiaries are "controlled **subsidiary corporations**" used for the purpose, *inter alia*, of "**separating** particular opera-

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[1] The parties have consented to the filing of this *amicus* brief, and their letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, has made a monetary contribution to the preparation or submission of this brief.

[2] Under the OCC's regulations, a subsidiary of a national bank qualifies as an "operating subsidiary" if (1) the subsidiary engages in "activities that are permissible for a national bank to engage in directly," and (2) the parent bank "controls" the subsidiary. 12 C.F.R. § 5.34(e)(1), (2).

tions of the [parent] bank from other operations." 31 Fed. Reg. 11,459, 11,460 (1966) (emphasis added). In adopting § 7.4006 in 2001, the OCC disregarded the separate legal existence of operating subsidiaries and called them "the equivalent of **departments or divisions** of their parent banks." 66 Fed. Reg. 34,784, 34,788 (2001) (emphasis added).

In combination with two other OCC regulations, § 7.4006 divests the States of their authority to regulate the activities and corporate governance of all state-chartered operating subsidiaries. First, 12 C.F.R. § 7.4000(a) provides that "State officials may not exercise any visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law."[3]

Second, under 12 C.F.R. § 7.2000(a), every "corporate governance procedure" of a national bank must "comply with applicable Federal banking statutes and regulations." Federal banking laws and OCC rules dictate many corporate governance matters for national banks, including the appointment and dismissal of officers; requirements for capital stock and dividends; shareholders' voting rights (including a requirement for cumulative voting in all elections of directors); numbers and qualifications of directors; required oaths for directors; and approvals of mergers and consolidations.[4]

By their terms, 12 C.F.R. §§ 7.4000 and 7.2000 apply only to "national banks." However, § 7.4006 makes both rules applicable to state-chartered operating subsidiaries, thereby preempting the States' authority to supervise such corporations' business activities or to regulate their corporate

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[3] The OCC issued 12 C.F.R. § 7.4000 in reliance on 12 U.S.C. § 484(a). As shown below at page 22, § 484(a) limits the exercise of "visitorial powers" only with respect to a "national bank" and does not refer to operating subsidiaries or other "affiliates" of a national bank.

[4] *See* 12 U.S.C. §§ 21-24, 51a-62, 71-76, 214a, 214b, 215-215c; 12 C.F.R. §§ 5.33, 7.2001 – 7.2024.

governance. Similarly, in 12 C.F.R. § 34.1(b), the OCC has asserted that operating subsidiaries engaged in real estate lending are entitled to rely on the same preemptive rules that the OCC has established for national banks in 12 C.F.R. § 34.4.

The decision below concluded that the OCC's regulations preempt several Michigan statutes. Those state statutes require state-chartered, non-bank mortgage lenders doing business in Michigan—including respondent Wachovia Mortgage Corporation ("Wachovia Mortgage")—to register with petitioner Commissioner of the Michigan Office of Insurance and Financial Services ("Commissioner"), to provide annual financial statements and to pay annual fees to the Commissioner, to maintain certain documents for review by the Commissioner, and to permit the Commissioner to conduct investigations of consumer complaints that are not being pursued by the OCC. By upholding the OCC's preemptive rules, the decision below divested the Commissioner of all authority to regulate state-chartered operating subsidiaries of national banks.[5]

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[5] Michigan exempts operating subsidiaries of national banks from some, but not all, of the regulatory requirements that apply to other non-bank mortgage lenders. *See* Pet. App. 2a & n.1, 3a-4a (describing Michigan laws preempted by the OCC's rules); Pet. 5-6 & nn.11-15 (same). Other States require operating subsidiaries to comply more fully with the regulatory requirements that apply to other non-bank mortgage lenders. *See, e.g., Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949, 954-55, 964-65 (9th Cir. 2005) (describing California laws preempted by the OCC's rules); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 310 (2d Cir.) (describing Connecticut laws preempted by the OCC's rules), *petition for cert. filed*, No. 05-431 (Sept. 30, 2005); *National City Bank of Indiana v. Turnbaugh*, __ F.3d, __, 2006 WL 2294843, at *1 & n.1 (4th Cir., Aug. 10, 2006) (describing Maryland laws preempted by the OCC's rules).

SUMMARY OF ARGUMENT

1. The Sixth Circuit Court of Appeals erred when it refused to apply a presumption against preemption of Michigan's laws governing state-chartered, non-bank mortgage lenders. The court also erred in holding that the OCC's preemptive regulations were entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In practical effect, the court created a presumption in favor of the OCC's authority to adopt rules preempting state law—a presumption that could not be overcome without an unambiguous statement of congressional intent to forbid the OCC's regulations. For three reasons, the court's approach was clearly mistaken.

First, the Sixth Circuit should have required the OCC to demonstrate that its preemptive rules were consistent with congressional intent, because "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). Second, the Sixth Circuit should have applied a presumption against preemption, because (i) this Court has affirmed that federally chartered banks are subject to state law, and (ii) this Court has repeatedly upheld the States' authority to regulate domestic corporations, and to require foreign corporations to comply with state laws designed to assure responsibility and fair dealing. Third, this Court should now hold that *Chevron* does not apply to a federal agency's regulation that claims to preempt state law. Preemption is "an extraordinary power in a federalist system." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Accordingly, the judiciary should undertake a *de novo* review of every preemptive rule to ensure that the federal-state balance is not altered without a deliberate decision by Congress.

2. Even if *Chevron* applies to this case, the OCC's regulations do not qualify for deference unless they were "promulgated pursuant to authority Congress has delegated to the

[OCC]." *Gonzales v. Oregon*, 126 S.Ct. 904, 916 (2006). None of the statutes cited by the OCC and the Sixth Circuit empowered the OCC to preempt the States' authority to regulate state-chartered corporations that are operating subsidiaries of national banks. Without such delegated authority, the OCC is not entitled to *Chevron* deference.

The OCC's rules are not authorized by 12 U.S.C. §§ 371(a), 484(a) or 24(Seventh). All three statutes refer only to national banks and do not mention operating subsidiaries. Operating subsidiaries cannot be treated as "national banks," a term that is expressly defined in 12 U.S.C. §§ 221 and 221a(a). Operating subsidiaries are chartered as non-bank corporations under state law, and they do not meet statutory criteria that national banks must satisfy in order to obtain federal charters under the National Bank Act. Rather, operating subsidiaries must be treated as "affiliates" of their parent national banks under 12 U.S.C. § 221a(b). The OCC has non-exclusive, concurrent authority to obtain reports from affiliates and to examine affiliates under 12 U.S.C. §§ 161(c) and 481. However, §§ 161(c) and 481 do not restrict the States' authority to regulate affiliates. In several statutes enacted since 1982—a period when Congress was well aware of operating subsidiaries—(i) Congress has specifically exempted operating subsidiaries from treatment as "affiliates" for only two narrowly-defined purposes, (ii) Congress has not exempted operating subsidiaries from treatment as "affiliates" under §§ 161(c) and 481, and (iii) Congress has not included any reference to operating subsidiaries in §§ 371(a) and 484(a).

Thus, Congress has established a clear distinction between national banks, on the one hand, and state-chartered, non-bank operating subsidiaries, on the other. Congress has also made clear that an operating subsidiary may not be treated as the equivalent of a national bank. Accordingly, the OCC had no authority to adopt rules that extend the scope of §§ 371(a) and 484(a) to reach operating subsidiaries, thereby obliter-

ating the careful separation that Congress has mandated between national banks and affiliated, non-bank entities.

Nor do 12 U.S.C. §§ 24a and 93a provide any support for the OCC's regulations. Section 24a(g)(3) exempts operating subsidiaries from certain federal statutory requirements that apply to "financial subsidiaries" of national banks (*i.e.*, subsidiaries that may conduct certain activities not permissible for banks). Section 24a(g)(3) is not a power-granting provision, and it does not express any intention to bar the States from regulating operating subsidiaries. When Congress enacted § 24a in 1999, it was understood that "[n]othing in this legislation is intended to affect the authority of national banks to engage in bank permissible activities through subsidiary corporations." S. Rep. No. 106-44, at 8 (1999). At that time, the OCC's regulations did not assert exclusive, preemptive authority over operating subsidiaries.

Under § 93a, the OCC may issue regulations "to carry out the responsibilities of the office." As the statute's carefully limited terms indicate, § 93a does not authorize the OCC to adopt rules that would expand the powers of national banks. When Congress enacted § 93a in 1980, the Senate floor manager for the legislation explained that § 93a "carries with it no new authority to confer on national banks powers which they do not have under existing substantive law." 126 Cong. Rec. 6902 (1980) (remarks of Sen. Proxmire). Thus, § 93a gives the OCC no authority to adopt rules extending the statutory definition of "national bank" to include state-chartered, non-bank operating subsidiaries for purposes of §§ 371(a) and 484(a).

ARGUMENT

THE OCC's REGULATIONS DO NOT QUALIFY FOR *CHEVRON* DEFERENCE.

A. A Presumption Against Preemption Should Be Applied in Determining Whether the OCC Possessed Statutory Authority to Adopt Its Preemptive Rules.

1. *The Sixth Circuit Erred When It Refused to Apply a Presumption Against Preemption.*

In upholding the OCC's rules, the Sixth Circuit refused to apply a presumption against preemption of Michigan's laws governing state-chartered, non-bank mortgage lenders. The court concluded that there was no need to decide "whether Congress has expressly and clearly manifested its intent to preempt state laws such as Michigan's." Pet. App. 7a. In the court's view, the OCC's preemptive rules were valid because there was no evidence of an "unambiguous intent of Congress" that would forbid the regulations. Pet. App. 10a. This reasoning was fundamentally flawed for three reasons.

First, the Sixth Circuit misread this Court's decision in *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982)). *De la Cuesta* does not relieve a reviewing court of its duty to determine whether a federal agency's pre-emptive rule is consistent with congressional intent. In *de la Cuesta*, this Court carefully considered "whether the [Federal Home Loan Bank] Board acted within its statutory authority in issuing [a] pre-emptive . . . regulation." *Id.* at 159. The Court upheld the Board's regulation because the "statutory language" of the Home Owners' Loan Act of 1933 suggested that "Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law." *Id.* at 162.

Thus, as this Court explained in *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986), "[t]he critical question in any pre-emption analysis is **always** whether Congress intended that federal regulation supersede state

law" (emphasis added). A court confronted with a preemption claim must therefore determine whether "language in the federal statute . . . reveals an explicit congressional intent to pre-empt state law" or, if not, whether "the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), and citing *de la Cuesta*, 458 U.S. at 152-53). Hence, the validity of a preemptive rule depends on whether that rule is consistent with congressional intent as manifested in Congress' delegation of authority to the agency:

> [A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of authority granted by Congress to the agency.

Louisiana Pub. Serv. Comm'n, 476 U.S. at 374.

Second, the Sixth Circuit was equally mistaken in concluding that it was required to defer to the OCC's rules under "the framework established by *Chevron*." Pet. App. 7a. The court interpreted *Chevron* as obliging it to "give great weight to any reasonable construction" of the national banking statutes by the OCC, as long as those statutes were "silent or ambiguous." Pet. App. 8a (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403 (1987), and *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995)). However, the court failed to recognize that neither *Clarke* nor *NationsBank* involved an OCC rule that purported to preempt state law. Instead, those cases dealt with OCC opinions interpreting federal statutes that placed limits on the permissible activities of national banks.

By misconstruing *de la Cuesta* and *Chevron*, the Sixth Circuit effectively created a presumption **favoring** the OCC's authority to issue regulations preempting state law—a presumption that could **not** be overcome without evidence that Congress had expressed an "unambiguous intent" to **prohibit** the OCC from adopting such rules. *See* Pet. App. 8a-10a. In this respect, the Sixth Circuit agreed with recent decisions of the Second, Fourth and Ninth Circuits, which also granted *Chevron* deference to the OCC's preemptive rules regarding state-chartered operating subsidiaries.[6] All four courts concluded that the OCC enjoyed free rein to adopt its preemptive regulations in the absence of a "manifest congressional intent" that would forbid such rules.[7] As shown below at pages 15-20, the decisions of all four courts represent a fundamental misapplication of *Chevron*.

Third, the Sixth Circuit concluded that a presumption against preemption was inapplicable because "[r]egulation of federally-chartered banks" is an area that has been "substantially occupied by federal authority for an extended period of time." Pet. App. 7a, n.3 (quoting *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005)). The Second, Fourth and Ninth Circuits took the same position in upholding the OCC's regulations. *See Burke*, 414 F.3d at 314; *Turnbaugh*, 2006 WL 2294843, at *3; *Boutris*, 431 F.3d

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[6] *See* the decisions in *Burke*, *Turnbaugh* and *Boutris*, cited *supra* at p. 3 n.5.

[7] *See Burke*, 414 F.3d at 317-18 (finding "no manifest congressional intent to preclude the OCC regulations in this case" because "no [federal] statute speaks directly to the scope of federal versus state power over [operating subsidiaries]"); Pet. App. 9a-10a (quoting *Burke* and reaching same conclusion); *Turnbaugh*, 2006 WL 2294843, at *4 (stating that "the NBA is silent on whether the OCC may regulate national banks' operating subsidiaries"); *Boutris*, 419 F.3d at 961 (stating that "the [National] Bank Act, is silent" regarding the OCC's authority over operating subsidiaries); *id.* at 959 n.12 (stating that Congress has not "unambiguously expressed [its] intent" to prevent the OCC from issuing its preemptive rules) (internal quotation marks and citation omitted).

at 956. As shown in the next section, all four courts were clearly mistaken in view of this Court's decisions affirming the States' long-established role in regulating national banks and state-chartered corporations. This Court has repeatedly held that "Congress should make its intention clear and manifest if it intends to pre-empt the historic powers of the States." *Gregory v. Ashcroft*, 501 U.S. at 461 (citations and internal quotation marks omitted). Congress has never expressed a clear and manifest intent to preempt the States' authority to regulate state-chartered, non-bank operating subsidiaries.

2. *This Court Has Repeatedly Upheld the States' Authority to Regulate National Banks and State-Chartered Corporations.*

In *Atherton v. FDIC*, 519 U.S. 213, 222 (1997), this Court reaffirmed that "federally chartered banks are subject to state law." As support for that principle, this Court quoted decisions reaching back to an 1870 case, holding that national banks

> are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when State law incapacitates the [national] banks from discharging their duties to the federal government that it becomes unconstitutional.

Id. at 222-23 (quoting *National Bank v. Commonwealth of Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870)).

Similarly, in *Barnett Bank* this Court held that States have "the power to regulate national banks" where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." 517 U.S. at 33. In two earlier cases, this Court explained that "the operation of general state laws upon the dealings and contracts of national banks" is the "rule", while preemption is an "exception" that applies only when state laws "expressly conflict with the laws of the

United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States." *First National Bank in St. Louis v. Missouri*, 263 U.S. 640, 656 (1924); *McClellan v. Chipman*, 164 U.S. 347, 357 (1896). All of these decisions are consistent with the presumption against preemption that this Court has applied in fields of traditional state regulation, including state legislation designed to protect consumers against abusive or unsafe practices in the sale of goods or services.[8]

Congress expressed its strong support for the presumptive application of state laws to national banks when it passed the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, 108 Stat. 2338 ("Riegle-Neal Act"). The Riegle-Neal Act requires interstate branches of national banks to comply with host state laws in four broadly-defined areas—community reinvestment, consumer protection, fair lending and intrastate branching—unless federal law preempts the application of such laws to national banks. 12 U.S.C. § 36(f)(1)(A). In explaining why state laws should generally apply to national banks, the conference report on the Riegle-Neal Act declared:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses and communities. . . .
>
> Under well-established judicial principles, national banks are subject to State law in many significant respects. . . . Courts generally use a rule of construction that avoids finding a conflict between the Federal and

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[8] *E.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 484-85 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516-20 (1992); *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963).

> State law where possible. The [Riegle-Neal Act] does not change these judicially established principles.[9]

By referring to "judicially established principles" under which "national banks are subject to State law in many significant respects," the Riegle-Neal conferees clearly indicated their endorsement of the approach followed by this Court in decisions such as *St. Louis*, *McClellan*, and *Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944).

In addition to disregarding the States' important role in regulating national banks, the Second, Fourth, Sixth and Ninth Circuits overlooked the radical nature of the OCC's attempt to obliterate legal distinctions between national banks and their state-chartered, non-bank operating subsidiaries. The OCC's rules ignore the separate legal status of operating subsidiaries and claim power to override the States' authority to regulate hundreds of state-chartered, non-bank corporations controlled by national banks.[10] In sharp contrast to the OCC's approach, this Court has repeatedly affirmed the authority of each State (i) to supervise comprehensively the corporations it charters, and (ii) to license and regulate companies chartered by other States that transact business within its borders. With regard to locally-chartered companies, this Court has declared that "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987). Furthermore, it "is an accepted part of the business landscape in this country for States to create

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[9] H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

[10] The OCC has published a list of nearly 500 operating subsidiaries of national banks that offer mortgage lending and other financial services to consumers. Many of these subsidiaries, including respondent Wachovia Mortgage, are large institutions carrying on a nationwide business through offices in numerous states. *See* "National Bank Operating Subsidiaries doing Business with Consumers as of 12/31/2005" (available at www.occ.treas.gov/consumer/Report—2006 for Op Sub pdf.pdf).

corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares." *Id.* at 91.

With respect to foreign corporations, this Court has held that each State "is legitimately concerned with safeguarding the interests of its own people in business dealings with corporations not of its own chartering but who do business within its borders." *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 208 (1944). Each State may therefore require foreign corporations to comply with licensing requirements and other regulations designed to "assur[e] responsibility and fair dealing." *Id.* at 210. *Jensen*'s affirmation of the States' authority to regulate foreign corporations is applicable to this case, because respondent Wachovia Mortgage Corporation has obtained a certificate of authority to transact business in Michigan as a foreign non-bank corporation. Pet. 5-6, 20-21.

This Court has consistently interpreted federal statutes to uphold the States' long-established authority to regulate state-chartered corporations, absent compelling evidence of congressional intent to the contrary. *E.g., CTS Corp.*, 481 U.S. at 85-86 (refusing to construe a federal statute to "pre-empt a variety of state corporate laws of hitherto unquestioned validity" because "[t]he longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all [such] state laws . . . it would have said so explicitly").[11] In the field of financial services, this Court has recognized the States' strong interest in regulating both banks and non-bank financial institutions, because "sound financial institutions and honest financial practices are essential to the health of any State's economy and to the well-being of its people." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980).

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[11] *Accord, Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) ("Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.").

Thus, the States play a vital role in regulating banks and non-bank providers of financial services to protect consumers against fraudulent and abusive practices. Recent studies have shown that state predatory lending laws provide significant benefits to consumers, due to the inadequate protections offered by current federal laws in the area of subprime lending.[12] State attorneys general and other state officials have obtained numerous enforcement orders against financial institutions in order to stop abusive practices such as predatory lending, privacy violations, telemarketing fraud, conflicts of interest among research analysts, manipulation of initial public offerings, and late-trading and market-timing in mutual funds.[13] However, contrary to the long-established principle of corporate federalism, the OCC's rules declare that state officials are barred from taking any enforcement actions against state-chartered operating subsidiaries of national banks.

In addition to its affirmation of state control over state-chartered corporations, this Court has held that the separate legal status of a subsidiary and its parent corporation is "a general principle of corporate law deeply ingrained in our economic and legal systems." *United States v. Bestfoods*,

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[12] *See* Baher Azmy, *Squaring the Predatory Lending Circle*, 57 Fla. L. Rev. 295, 300-03, 350-81, 390-400 (2005); Wei Li & Keith S. Ernst, "The Best Value in the Subprime Market: State Predatory Lending Reforms," Center for Responsible Lending, Feb. 23, 2006 (available at www.responsiblelending.org/reports/stateeffects.cfm); Roberto G. Quercia, Michael A. Stegman & Walter R. Davis, *Assessing the Impact of North Carolina's Predatory Lending Law*, 15 Housing Pol'y Debate No. 3 (Fannie Mae Foundation, 2004), at 573.

[13] *See* Todd Houge & Jay Wellman, *Fallout from the Mutual Fund Trading Scandal*, 62 J. Bus. Ethics 129 (2005); Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. Banking & Fin. L. 225, 314-16, 348-56 (2004); Erick Bergquist, "Settlement by Ameriquest—A Model for Subprime?," Am. Banker, Jan. 24, 2006, at 9.

524 U.S. 51, 61 (1998) (citation and internal quotation marks omitted); *accord, Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). Accordingly, the Court has consistently applied a presumption that federal statutes embody the principle of corporate separation, absent clear evidence that Congress intended a different result. *See, e.g., Bestfoods*, 524 U.S. at 62; *Dole Food*, 538 U.S. at 475-76. Notwithstanding this fundamental principle, the OCC has erroneously claimed, without statutory support, that operating subsidiaries are "the equivalent of departments or divisions of their parent banks." 66 Fed. Reg. 34,784, 34,788 (2001).

B. *Chevron* Should Not Be Applied to Preemptive Rules Issued by Federal Agencies.

This Court has never ruled definitively on the question of whether *Chevron* applies to preemptive rules issued by federal agencies. In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the petitioner contended that the presumption against preemption of state law "in effect trumps *Chevron*." *Id.* at 743. The petitioner argued that a reviewing court must "make its own interpretation of [the federal statute] that will avoid (to the extent possible) pre-emption of state law." *Id.* at 743-44. After noting the petitioner's argument, the Court assumed, without deciding, that the question of a statute's preemptive effect "must always be decided *de novo* by the courts." *Id.* at 744.

This Court should now hold that the *Chevron* doctrine does not apply to federal agency rules that claim to preempt state law. The judicial branch has an institutional responsibility to undertake a *de novo* review of federal agency preemptive rules to ensure that preemption issues are resolved in accordance with the Constitution's allocation of federal and state powers. As this Court emphasized in *Gregory v. Ashcroft*, 501 U.S. at 460, the power to preempt "is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." *Id.* Accordingly, this Court has required Congress to "make its intention

'clear and manifest' if it intends to pre-empt the historic powers of the States." *Id.* at 461 (citations and internal quotation marks omitted). Indeed, "the whole jurisprudence of preemption" is intended to serve as a means of "maintaining the federal balance" between national and state power. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring). The judiciary should therefore require any federal agency that adopts regulations preempting the States' traditional powers to demonstrate that the agency has received a clear and manifest delegation of the requisite rulemaking authority from Congress.

The Sixth Circuit's decision demonstrates that, as a practical matter, the granting of *Chevron* deference to preemptive rules will give federal agencies virtually unlimited discretion to override state law so long as "the unambiguous intent of Congress" does not forbid such regulations. Pet. App. 9a-10a. Such a result contravenes the precept that our federal system "may not be compromised without a **congressional decision** to do so—an important requirement in light of the various safeguards against cavalier disregard of state interests created by the system of state representation in Congress." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 331 (2000) (emphasis added). Given the Constitution's "commitment to a federal structure," federal agencies should not be allowed to invoke *Chevron* as a mandate to "interpret ambiguous [statutory] provisions so as to preempt state law." *Id.* While the issue of *Chevron* deference was not discussed in *Gregory*, this Court did express the view that "[w]e must be absolutely certain that Congress intended [to alter the state-federal balance.] '[T]to give the state-displacing weight of federal law to mere congressional **ambiguity** would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'" *Gregory*, 501 U.S. at 464 (quoting L. Tribe, *Constitutional Law* § 6-25, p. 480 (2d ed. 1988)).

Moreover, the OCC's self-interest in issuing preemptive rules provides a special and compelling reason for rejecting

that agency's appeal for *Chevron* deference. Section 7.4006 is one of a series of preemptive rules and opinions that the OCC has issued in recent years. In defending its preemptive rulings, the OCC has declared that preemption of state law is "a significant benefit of the national charter—a benefit that the OCC has fought hard over the years to preserve."[14] The OCC's expansive view of preemption has given national banks a "major advantage" over state banks, because the OCC believes national banks should be free to "conduct a multistate business subject to a single uniform set of federal laws, under the supervision of a single regulator, free from visitorial powers of various state authorities."[15]

The OCC has a powerful self-interest in persuading the largest banks to operate under national charters. Virtually all of the OCC's budget is funded by assessments paid by national banks, and the biggest national banks pay the highest assessments. In response to the OCC's aggressive preemption efforts, several large, multistate banks have recently converted from state to national charters, thereby producing a significant increase in the OCC's assessment revenues.[16] The OCC's record of enforcing consumer protection laws has been described as "relatively lax" and "unimpressive"—a record that is consistent with the OCC's budgetary incentives to adopt policies that encourage large banks to operate under national charters.[17] Given the OCC's obvious financial

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[14] Speech by Comptroller of the Currency John D. Hawke, Jr., on Feb. 12, 2002, quoted in Wilmarth, *supra* note 13, at 236, 274.

[15] *Id.*, quoted in Wilmarth, *supra* note 13, at 236, 274.

[16] *See* Wilmarth, *supra* note 13, at 274-79, 289-93; Arthur E. Wilmarth, Jr., *OCC v. Spitzer: An Erroneous Application of* Chevron *That Should Be Reversed*, 86 BNA's Banking Rep. No. 8, Feb. 20, 2006, at 379, 387.

[17] Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 Temple L. Rev. 70-74, 77-81 (2005) (quote at 81); Wilmarth, *supra* note 13, at 232 (quote), 274-77, 289-93, 306-16, 351-56. *See also* Br. *Am. Cur.* Center for Responsible Lending *et al.*

motives for issuing preemptive regulations, those rules should be denied any deference under *Chevron*.[18]

C. Even If *Chevron* Applies to Preemptive Rules, the OCC's Regulations Do Not Qualify for Deference.

1. *The Sixth Circuit Erred in Concluding that Statutory Ambiguity Mandates Deference.*

Even if this Court determines that the *Chevron* doctrine may properly be applied in reviewing preemptive regulations, the OCC's regulations are not entitled to deference. As explained above, the decisions of the Second, Fourth, Sixth and Ninth Circuits effectively give the OCC carte blanche to issue regulations preempting state law unless Congress has prohibited such regulations by unambiguous statutory language. This Court's recent decision in *Gonzales v. Oregon*, 126 S.Ct. 904 (2006), demonstrates that all four courts failed to understand the prerequisites for *Chevron* deference.

In *Gonzales*, the Court held that "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved." *Id.* at 916. Even if a statute is ambiguous, deference is appropriate under *Chevron* only if a federal agency's regulation is "promulgated pursuant to authority Congress has delegated to the [agency]." *Id.* Moreover, if the agency claims "broad and unusual authority through an implicit delegation" based on "vague terms or ancillary provisions" in the governing statute, the reviewing court may properly conclude that "Congress could not have intended to delegate a decision of such economic and political

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[18] *See* Wilmarth, *supra* note 13, at 232-33, 293-98; *see also* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J. L. & Pub. Pol'y 203, 206-07, 286 (2004) (contending that "the courts should not accord *Chevron* deference to interpretations of law that implicate the self-interest of the issuing agency," because "*Chevron* effectively places the agency's thumb on the judicial scales, which should not be tolerated when the interpretation before the court advances the agency's own self-interest").

significance to an agency in so cryptic a fashion." *Id.* at 921 (internal quotation marks and citations omitted).

Thus, statutory silence or ambiguity is not a sufficient basis for granting deference to a federal agency's regulation under *Chevron*. Instead, "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). Accordingly, a reviewing court must carefully consider—before it applies *Chevron*'s two-step analysis—whether Congress has expressly or implicitly authorized the agency to adopt a regulation to clarify the ambiguity or to fill the gap that the agency has identified in the governing statute. Only if the court answers "yes" to this essential question may the court then apply *Chevron*'s two-step analysis to determine whether the agency's interpretation of the statute is entitled to deference. *See Gonzales v. Oregon*, 126 S.Ct. at 916-22, 925; *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Moreover, when an agency issues a ruling that significantly expands its jurisdiction or encroaches upon an area traditionally regulated by the States, the reviewing court should be highly skeptical of the agency's claim of implied authority unless the agency can show that its ruling is consistent with persuasive evidence of congressional intent. *See Gonzales v. Oregon*, 126 S.Ct. at 921-22, 924-25.

In *Gonzales*, the United States Attorney General, relying on the Controlled Substances Act ("CSA"), adopted an interpretive rule that barred doctors from prescribing drugs to be used in assisted suicides. The rule was specifically intended to override any state law authorizing state-licensed physicians to prescribe drugs for that purpose. This Court invalidated the rule because (i) the Attorney General's claim of authority would "effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality", and (ii) the "text and structure of the CSA show that Congress did not have this

far-reaching intent to alter the federal-state balance and the congressional role in maintaining it." *Id.* at 925.

In *Am. Bar Ass'n v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), the court followed a similar approach in refusing to give *Chevron* deference to an FTC ruling The ruling classified attorneys as "financial institutions" for purposes of a federal banking statute that required financial institutions to protect the privacy of their customers. The ruling would have enabled the FTC to "extend its regulatory authority over attorneys engaged in the practice of law," *id.* at 468, even though "the regulation of the practice of law is traditionally the province of the states." *Id.* at 471. In striking down the ruling, the court held that "Congress has not made an intention to regulate the practice of law 'unmistakably clear' in the language of the [federal statute]," and "it is not reasonable for an agency to decide that Congress has chosen such a course of action in language that is, even charitably viewed, at most ambiguous." *Id.* at 472 (citations omitted).

The court also rejected the FTC's suggestion that a federal agency's ruling should be entitled to a highly deferential review under "step two" of *Chevron* in any case where the "[federal] statute does not expressly **negate** the existence of a claimed administrative power." *Id.* at 468 (internal quotation marks and citation omitted). The court held that such an application of *Chevron* would be "flatly unfaithful to the principles of administrative law . . . and refuted by precedent. . . . Plainly, if we were to **presume** a delegation of power from the absence of an express **withholding** of such power, agencies would enjoy virtually limitless hegemony." *Id.* (internal quotation marks and citation omitted).

2. *Congress Has Not Authorized the OCC to Prohibit the States from Regulating State-Chartered Operating Subsidiaries.*

Like the agency rulings struck down in *Gonzales v. Oregon* and *ABA v. FTC*, 12 C.F.R. § 7.4006 radically extends a federal agency's authority into an area traditionally regulated

by the States. As shown above, § 7.4006 disregards the legal separation between national banks and their state-chartered, non-bank operating subsidiaries. In combination with two other regulations (12 C.F.R. §§ 7.2000 & 7.4000), § 7.4006 preempts all state authority to regulate such subsidiaries. The Second, Fourth, Sixth and Ninth Circuits each concluded that the OCC's regulations are permissible under some or all of the following statutes—12 U.S.C. §§ 371(a), 484(a), 24(Seventh), 24a and 93a. *See Burke*, 414 F.3d at 311-16; *Turnbaugh*, 2006 WL 2294843, at *2, *4-*5; Pet. App. 5a, 8a; *Boutris*, 419 F.3d at 957-64. However, as shown below, none of those statutes authorizes the OCC to exercise exclusive and preemptive authority over state-chartered operating subsidiaries. Without such delegated authority, the OCC cannot satisfy the "precondition to deference under *Chevron*." *Adams Fruit Co.*, 494 U.S. at 649.

a. Sections 371(a), 484(a) and 24(Seventh) Do Not Authorize the OCC's Rules

Section 371(a) provides that a "national banking association" may make real estate loans "subject to section 1828(*o*) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371(a). Thus, under § 371(a), the OCC's regulations may prescribe "restrictions and requirements" **only** with respect to real estate loans made by a "national banking association." In addition, the OCC's regulations under § 371(a) must be consistent with the uniform interagency real estate lending standards adopted by all of the federal banking agencies under 12 U.S.C. § 1828(*o*). Those uniform standards apply **only** to national banks and other FDIC-insured depository institutions.[19] Neither § 371(a) nor

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[19] *See* 57 Fed. Reg. 62,890 (1992) ("Summary" of final rule, stating that the federal banking agencies "have adopted a final uniform rule on real estate lending by insured depository institutions . . . as required by [12 U.S.C. § 1828(*o*)"]).

§ 1828(*o*) makes any reference to state-chartered, non-bank operating subsidiaries of national banks.

Section 484(a) provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice" or exercised under congressional authority. 12 U.S.C. § 484(a). Thus, state officials may not examine national banks, except as authorized in § 484(b), and state officials also may not bring administrative enforcement proceedings (*e.g.*, for cease-and-desist orders or civil money penalties) against national banks. *See First Union National Bank v. Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999). Like §§ 371(a) and 1828(*o*), § 484(a) refers **only** to national banks and does not mention operating subsidiaries.

By adopting 12 C.F.R. §§ 34.1(b) and 7.4006, the OCC attempted to extend the scope of 12 U.S.C. §§ 371(a) and 484(a) to reach operating subsidiaries of national banks. The OCC had no authority to take that step, because §§ 371(a) and 484(a) apply only to national banks and operating subsidiaries cannot qualify for treatment as national banks. The term "national bank," as used in §§ 371(a) and 484(a), is defined in 12 U.S.C. §§ 221 & 221a(a). As those statutes and related federal laws make clear, a "national bank" is a financial institution that (i) obtains a federal charter to conduct the "business of banking," pursuant to 12 U.S.C. §§ 21-24, 26-27; (ii) is required to become a member of the Federal Reserve System ("FRS") under 12 U.S.C. § 282; and (iii) is eligible to become an FDIC-insured bank under 12 U.S.C. §§ 1813(a)(1), (c)(2) & (4), 1814-16.

Operating subsidiaries do **not** qualify for treatment as "national banks" under §§ 221 and 221a(a), because

- they are chartered as **non-bank** corporations under **state** law;
- they do **not** receive a federal charter to conduct the "business of banking";

- they **cannot** qualify to become members of the FRS; and
- they are **not** eligible to receive deposit insurance from the FDIC.

Rather, operating subsidiaries must be treated as "affiliates" of national banks under 12 U.S.C. § 221a(b), which defines "affiliate" to include "any corporation" that is controlled by a national bank. Under 12 C.F.R. § 5.34(e)(2), an operating subsidiary must be controlled by its parent national bank. Thus, an operating subsidiary is unquestionably an "affiliate" of its parent bank under § 221a(b).

Under 12 U.S.C. §§ 161(c) and 481, the OCC may obtain reports from affiliates and may examine affiliates in order to assess the relationships between those entities and national banks. However, §§ 161(c) and 481 do not restrict the States' authority to regulate affiliates. To confirm this preservation of concurrent state authority over affiliates, Congress has not included any reference to "affiliates" in either § 371(a) or § 484(a). As this Court has repeatedly observed, "'it is generally presumed that Congress acts intentionally and purposely' when 'it includes particular language in one section of a statute but omits it in another.'" *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)). Accordingly, §§ 371(a) and 484(a) must be construed to apply only to national banks and not to "affiliates."

Under 12 U.S.C. §24(Seventh), a "national banking association" has authority "[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking." Like §§ 371(a) and 484(a), § 24(Seventh) refers only to national banks and does not mention "affiliates." This Court has noted that § 24(Seventh) "by its terms applies **only** to banks," while "[o]rganizations affiliated with banks . . . are dealt with by **other sections** of the [Banking] Act [of 1933]." *Board of Governors v. Inv. Co. Instit.*, 450 U.S. 46, 58-59 n.24 (1981) (emphasis added). Section 24(Seventh) may give

national banks the "incidental power" to own operating subsidiaries, but it does not express any congressional purpose to preempt state regulation of such subsidiaries. In *Marquette National Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978), this Court concluded that 12 U.S.C. § 85 preempted state usury laws with regard to national banks, but the Court expressly declined to decide whether that preemption extended to operating subsidiaries. *Id.* at 307-08.

When the statutes dealing with "affiliates" were enacted as part of the Banking Act of 1933, the Senate committee report expressed the committee's intent "[t]o **separate as far as possible** national . . . banks from **affiliates of all kinds**," and "[t]o install a satisfactory examination of affiliates". S. Rep. No. 73-77, at 10 (1933) (emphasis added). To accomplish these goals, Congress adopted three statutes—12 U.S.C. §§ 52, 161(c) & 481. Section 52 requires national banks to separate their own stock from the stock of their affiliates. *See* S. Rep. No. 73-77, at 16 (1933) (discussing §18 of the 1933 Act). As noted above, §§ 161(c) and 481 grant the OCC a non-exclusive and concurrent right to obtain reports from affiliates of national banks and to examine such affiliates. *See* S. Rep. No. 73-77, at 10, 17.

In *Burke*, the Second Circuit dismissed the significance of Congress' treatment of "affiliates." In that court's view, the 1933 Act "targeted national banks' use of affiliates to engage in non-commercial banking and does not address national banks' use of operating subsidiaries to engage in the business of banking." 414 F.3d at 317.

In fact, Congress knew about three types of national bank subsidiaries that carried on portions of the banking business in 1933. At that time, subsidiaries of national banks could (1) operate a safe-deposit business, Act of Feb. 25, 1927, § 2(b), 44 Stat. 1227 (codified at 12 U.S.C. § 24(Seventh)); (2) own bank premises, Act of June 16, 1933, § 14, 48 Stat. 184 (codified at 12 U.S.C. § 371d); and (3) conduct international banking activities, Federal Reserve Act, § 25(a), 41 Stat. 378

(codified at 12 U.S.C. § 615). The 1933 Act exempted all three types of subsidiaries from 12 U.S.C. § 371c, which limits financial transactions between national banks and their "affiliates." However, all three types of subsidiaries were treated as "affiliates" of national banks under 12 U.S.C. §§ 161(c) and 481. Act of June 16, 1933, §§ 2(b), 13, 27 & 28, 48 Stat. 162, 183, 191-93; *see also* S. Rep. No. 73-77, at 15, 17 (1933) (explaining that "[c]ertain types of affiliates" were exempted from § 371c, while "all types of affiliates" were subject to §§ 161(c) & 481). Thus, Congress clearly intended in 1933 that national bank subsidiaries carrying on portions of the banking business—like operating subsidiaries today—would be treated as "affiliates" except under 12 U.S.C. § 371c.

Congress reaffirmed this regulatory regime in 1982 and thereafter, when it did know about operating subsidiaries, which were first authorized by the OCC in 1966. *See* 31 Fed. Reg. 11,459 (1966). In 1982, Congress exempted operating subsidiaries from treatment as "affiliates" **solely** for purposes of the restrictions on financial transactions between national banks and their affiliates under 12 U.S.C. § 371c. Act of Oct. 15, 1982, § 410(b), 96 Stat. 1515 (codified at 12 U.S.C. § 371c(b)(2)(A)). In 1987, Congress granted a similar exemption **solely** for purposes of the limitations on non-financial transactions between national banks and their affiliates under 12 U.S.C. § 371c-1. Act of Aug. 1, 1987, § 102(a), 101 Stat. 565 (codified at § 371c-1(d)(1)). These special exemptions in §§371c and 371c-1 make clear that operating subsidiaries must be treated as "affiliates" under **other** federal banking statutes. Indeed, Congress did not exempt operating subsidiaries from treatment as "affiliates" when it subsequently amended §§ 161(c) and 481. *See* Act of Sept. 23, 1994, § 308(a), 108 Stat. 2218; Act of Dec. 19, 1991, § 114(b), 105 Stat. 2248.

Moreover, Congress has repeatedly indicated its intention not to bring operating subsidiaries within the scope of 12

U.S.C. §§ 371(a) and 484(a). Congress did not insert any reference to operating subsidiaries when it amended §§ 371(a) and 484(a) in 1982. Act of Oct. 15, 1982, §§ 403(a) & 412, 96 Stat. 1510, 1521. Similarly, Congress did not include any mention of operating subsidiaries when it amended § 484(a) in 1983, or when it amended § 371(a) in 1991. Act of Jan. 12, 1983, § 23(a), 96 Stat. 2510; Act of Dec. 19, 1991, § 304(b), 105 Stat. 2354.

Thus, in the 1933 Act and in several statutes adopted since 1982, Congress has established a clear distinction between national banks, on the one hand, and non-bank subsidiaries carrying on discrete portions of the banking business, on the other. In several statutes enacted since 1982, Congress—despite its familiarity with operating subsidiaries—(i) has not exempted operating subsidiaries from treatment as "affiliates" under §§ 161(c) and 481, and (ii) has not included any reference to operating subsidiaries in 12 U.S.C. § 371(a), which grants real estate lending powers to national banks, or in 12 U.S.C. § 484(a), which limits the exercise of visitorial powers over national banks.

In view of the foregoing statutes, the OCC had no authority to adopt 12 C.F.R. §§ 34.1(b) & 7.4006. The OCC's regulations unlawfully extend the scope of §§ 371(a) and 484(a) to reach operating subsidiaries, thereby obliterating the careful separation that Congress has mandated between national banks and their non-bank affiliates. As this Court declared in *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 485 (2001), an agency "may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion."

b. Sections 24a and 93a Do Not Authorize the OCC's Rules.

The OCC also lacked authority to adopt its preemptive rules under 12 U.S.C. §§ 24a and 93a. Section 24a was enacted in 1999 as § 121(a)(2) of the Gramm-Leach-Bliley Act, 113 Stat. 1338, 1373 ("GLBA"). Section 24a permits

national banks to establish "financial subsidiaries" to engage in certain activities (e.g., securities underwriting and dealing) that are not lawful for banks. Under § 24a(g)(3), the term "financial subsidiary" does not include a subsidiary that "engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks." The purpose of § 24a(g)(3) is to exempt operating subsidiaries from federal statutory requirements (e.g., capital levels, managerial ratings, and community reinvestment standards) that apply to financial subsidiaries under §24a(a)-(f). Section 24a(g)(3) is not a power-granting provision, and it does not express any intention to bar the States from regulating operating subsidiaries. Indeed, when Congress adopted § 24a, it was understood that "[n]othing in this legislation is intended to affect the authority of national banks to engage in bank permissible activities through subsidiary corporations." S. Rep. No. 106-44, at 8 (1999). At that time, the OCC's regulations did not assert exclusive, preemptive authority over operating subsidiaries.

Indeed, § 24a was intended to **restrict**—not expand—the OCC's authority over operating subsidiaries. The conference report on GLBA expressed the conferees' view that the OCC should rescind a prior regulation, which allowed operating subsidiaries to conduct activities that were not lawful for national banks. H.R. Rep. No. 106-434, at 160 (1999) (Conf. Rep.), *reprinted in* 1999 U.S.C.C.A.N. 245, 255. The OCC responded in 2000 by amending 12 C.F.R. § 5.34(e)(3) to stipulate that operating subsidiaries may conduct only activities permissible for national banks.[20] Thus, § 24a(g)(3) reflects the GLBA conferees' intention to **limit** the OCC's authority to prescribe the powers of operating subsidiaries.

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[20] *See* 65 Fed. Reg. 12,905, 12,909 (2000) (explaining that the OCC amended 12 C.F.R. § 5.34(e)(3) in response to GLBA, which "makes clear that an operating subsidiary may engage only in activities that are permissible for the parent bank to engage in directly").

Accordingly, § 24a(g)(3) cannot reasonably be construed as a justification for the OCC's preemptive regulations.

Under 12 U.S.C. § 93a, the OCC may issue regulations "to carry out the responsibilities of the office." When § 93a was enacted in 1980, the Senate floor manager for the legislation declared that § 93a "is only available to carry out the responsibilities of the [OCC] and **carries with it no new authority to confer on national banks powers which they do not have under existing substantive law."** 126 Cong. Rec. 6902 (remarks of Sen. Proxmire) (emphasis added).[21] In *Conference of State Bank Supervisors v. Conover*, 710 F.2d 878 (D.C. Cir. 1983) (per curiam), the court similarly held that § 93a allows the OCC to issue preemptive rules "[s]o long as [the OCC] does not authorize activities that run afoul of federal laws governing the activities of national banks." *Id.* at 885. Subsequently, the same court confirmed that "[n]ational banks, being creatures of statute, possess **only those powers conferred upon them by Congress**." *Indep. Ins. Agents of Am. v. Hawke*, 211 F.3d 638, 640 (D.C. Cir. 2000) (citations omitted; emphasis added). The court therefore struck down an OCC ruling that sought to expand the powers of national banks beyond the limits established by Congress. *Id.* at 643-45.

In view of the OCC's narrowly limited rulemaking power under § 93a, the OCC had no authority to adopt regulations that expand the term "national bank" to include state-chartered, non-bank operating subsidiaries for purposes of 12 U.S.C. §§ 371(a) and 484(a). In *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361 (1986), this Court struck down a regulation of the Federal Reserve Board, which expanded the statutory definition of "bank" set forth in the

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[21] *See also* H.R. Rep. No. 96-842, at 83 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 298, 313 (stating that § 93a "carries with it no authority to permit otherwise impermissible activities of national banks with specific reference to the provisions of the McFadden Act and the Glass-Steagall Act").

Bank Holding Company Act ("BHC Act"), 12 U.S.C. § 1841(c). The Board argued that the definition of "bank" should be extended to reach "nonbank banks," because such entities were "'functionally equivalent' to banks." *Id.* at 363-64, 373. This Court held, however, that the Board could not disregard the limits on its authority established by the "plain language" of the BHC Act. *Id.* at 373-74. The Court also rejected the Board's attempt to rely on its power to adopt rules to "administer and carry out the purposes of the [BHC Act] and prevent evasions thereof," under 12 U.S.C. § 1844(b). The Court held that § 1844(b) "only permits the Board to police within the boundaries of the [BHC] Act; it does not permit the Board to expand its jurisdiction beyond the boundaries established by Congress." *Id.* at 373 n.6. Similarly, 12 U.S.C. § 93a does not allow the OCC to extend the statutory definition of "national bank" under 12 U.S.C. §§ 221 & 221a(a) so that it includes state-chartered, non-bank operating subsidiaries.

Given the States' historic role in protecting their citizens from abusive financial practices, the OCC could not lawfully adopt rules preempting the States' authority to regulate operating subsidiaries without a clear and manifest delegation of authority from Congress. *See Gregory v. Ashcroft*, 501 U.S. at 461, 464. Congress has never expressed an intention to delegate such power to the OCC, and the OCC's rules are therefore invalid.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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No. 05 - 1342

In the
Supreme Court of the United States
October Term, 2006

LINDA A. WATTERS, COMMISSIONER, MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES,
Petitioner,
v.
WACHOVIA BANK, N.A. *et al.*,
Respondent.

On Writs of *Certiorari* to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS ON THE MERITS

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QUESTIONS PRESENTED

Amicus Curiæ New England Legal Foundation ("NELF") adopts the Questions Presented as stated by Respondents Wachovia Bank, N.A. *et al.*:

> National banks' "incidental powers" under the National Bank Act [*defined at* 12 U.S.C. § 38] include the power to conduct banking activities through operating subsidiaries that are licensed, regulated and supervised by the Office of the Comptroller of the Currency ("OCC"). National bank activities conducted through an operating subsidiary are subject to the "same terms and conditions" that apply to the conduct of such activities by the national bank. 12 U.S.C. § 24a; 12 C.F.R. § 5.34(e)(3). National banks' federally-authorized mortgage lending activities are regulated and supervised exclusively by the OCC. The questions presented are:
>
> 1. Whether national bank mortgage lending activities are subject to exclusive OCC regulation and supervision when conducted through an operating subsidiary, just as they are when conducted directly by the parent bank.
>
> 2. Whether the OCC's exclusive regulation and supervision of national bank mortgage lending activities conducted through operating subsidiaries is permissible under the Tenth Amendment.

In this Brief, *Amicus Curiæ* New England Legal Foundation ("NELF") principally addresses the first question as stated by Respondents.

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---

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS ON THE MERITS

INTEREST OF *AMICUS CURIÆ*

Amicus Curiæ New England Legal Foundation ("NELF") seeks to bring to the Court's attention its views, and the views of its supporters, concerning the authority of the Office of the Comptroller of the Currency ("OCC") to preempt state regulation of national bank subsidiaries.[1]

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1 Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that neither counsel for Petitioners nor Respondent authored this Brief in whole or in part and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.3 (a), counsel for *Amicus* has submitted consent by Respondents to the filing of this Brief and that Petitioner's consent to all *amicus* briefs is on file with this Court.

Amicus Curiæ NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States.

NELF's members are affected by the business climate in New England, which depends, in part, upon fairly balanced and efficient business regulation with clearly determined reporting responsibilities. Many of NELF's members are banks and many other NELF members are engaged in heavily regulated industries, such as insurance, healthcare, and energy production and distribution. Therefore, they are concerned about the proper balance of state and federal regulations in their industries. They are especially concerned about the impact of unnecessary costs associated with inefficient, uncoordinated, and duplicative regulations. Furthermore, some of NELF's members, particularly those in the small business sector who often operate on the margins of profitability. are concerned with duplicative regulation because they utilize the services of regulated industries and must therefore bear the passed-on costs of such regulation.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Rapanos v. United States*, 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*,

126 S. Ct. 1843 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). NELF served as *amicus curiæ* in *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), *cert. pending*, 05-431 (filed Sept. 30, 2005), which addressed similar issues to those raised in this case.

A reversal by this Court of the decision of United States Court of Appeals for the Sixth Circuit below would result in duplicative state and federal regulation of national bank subsidiaries, resulting in significant additional costs to the banking sector, which could have an adverse effect on the business climate of New England and the nation as a whole. For these reasons, NELF's members are concerned about the issues presented in this case.

Amicus Curiæ therefore believes that this brief provides an additional perspective which may aid the Court in determining the issues raised in this case.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the Brief of Respondents.

SUMMARY OF ARGUMENT

This *Amicus* Brief focuses on the sound public policy reasons for enforcing the Office of the Comptroller of the Currency ("OCC") regulation preempting duplicative state regulation of national bank subsidiaries. 12 C.F.R. § 7.4006

("Section 7.4006"). *Amicus* argues that the regulation issued by OCC preempting state regulation of national bank subsidiaries was properly issued, because it is a reasonable interpretation of the relevant provisions of the National Banking Act, *defined at* 12 U.S.C. § 38 ("NBA"). Moreover, parallel regulation by state and federal governments of national banking subsidiaries would result in unnecessary, inefficient, and costly duplicative regulation. The costs of any such duplicative regulation would inevitably be passed on to the banks' customers, resulting in higher interest rates and fees for borrowing. These additional costs are likely to have a particularly harmful effect on small businesses, many of which operate on the margins of profitability, and rely on financing through the type of home equity loans that are at issue in this case. Even relatively small cost increases attributable to duplicative regulation can have a serious adverse impact on a struggling small business.

In the American federal system, OCC, as the federal regulator in charge of administering the NBA, must be allowed to determine to what extent parallel state regulation is consistent with the federal legislative scheme. The OCC has reasonably determined that parallel state regulation of national bank subsidiaries is unwarranted and should be preempted. This economically efficient determination should be upheld.

ARGUMENT

I. Preemption of state regulation of national bank subsidiaries is reasonable and sound public policy because the inherent inefficiency of duplicative regulation outweighs any potential benefit.

This case involves the attempt by Petitioner, the Commissioner of the Michigan Office of Insurance and Financial Services ("Commissioner"), to regulate Respondent

Wachovia Mortgage Corp. ("Wachovia Mortgage"), a wholly owned operating subsidiary of Respondent national bank Wachovia Bank, N.A. ("Wachovia Bank"). (Collectively, Wachovia Mortgage and Wachovia Bank are referred to herein as "Wachovia.") The OCC regulates national banks under the National Banking Act, *defined at* 12 U.S.C. § 38 ("NBA"). 12 U.S.C. § 484 (a) of the NBA preempts state regulatory oversight, called "visitation," of national banks. On June 29, 2001, OCC issued 12 C.F.R. § 7.4006 ("Section 7.4006"), which permits state regulation of national bank subsidiaries only to the extent that states may regulate national banks themselves. 66 Fed. Reg. 34,784, 34,792 (July 2, 2001).[2] Section 7.4006 states: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."

The District Court and Court of Appeals agreed with Wachovia that Section 7.4006 preempts state regulation of national bank subsidiaries, such as Wachovia Mortgage. *Wachovia Bank, N.A. v. Watters*, 334 F. Supp. 2d 957 (W.D. Mich. 2004), *aff'd*, 431 F.3d 556 (6th Cir. 2005). In another recent case involving similar state regulations in Connecticut, the courts similarly upheld preemption under Section 7.4006. *Wachovia Bank, N.A. v. Burke*, 319 F. Supp. 275 (D. Conn. 2004), *aff'd*, 414 F.3d 305 (2d Cir. 2005).

In her brief, the Commissioner futilely attempts to

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2 The regulation was part of the OCC's effort to conform its regulations to the Gramm-Leach-Bliley Act, Pub. L. 106-102 ("GLBA"). 66 Fed. Reg. at 34,784, 37,788. Relevant provisions of GLBA include the regulation of national bank subsidiaries that "are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. § 24a (g) (3).

avoid analysis of Section 7.4006 under the long-standing test for federal preemption prescribed by *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Commissioner's Brief at 28–38. *Chevron*, however, mandates that courts, when interpreting a regulation to determine its preemptive effect on state law, examine whether the challenged regulation was "based on a permissible construction of the [applicable] statute," in this case, the NBA. *Chevron*, 467 U.S. at 843. In that regard, courts should generally uphold the construction by the applicable agency when it is reasonable. *See Bell v. Reno*, 218 F.3d 86, 90 (2d Cir. 2000); *Lettman v. Reno*, 207 F.3d 1368, 1371–72 (11th Cir. 2000).

Amicus contends that the reasonableness analysis under *Chevron* implicates the very public policy concerns that *Amicus* relies on in its argument. In this case, OCC thoughtfully considered the appropriateness of state regulation of national bank subsidiaries and reasonably determined that exclusive federal regulation made sense in the circumstances. 66 Fed. Reg. at 34,788–89.[3]

Amicus's argument concentrates on the reasonableness of OCC's intent to preempt state regulation of federal banking subsidiaries through Section 7.4006 and the sound public policy grounds for upholding the regulation.[4] Although there

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3 The OCC rulemaking by which it adopted Section 7.4006 discussed the comments on the proposed regulation (the majority of which supported the regulation). 66 Fed. Reg. at 34,788–89. OCC determined that criticisms of the proposed rule were ill-founded: "We disagree with those commentators who believe that the new § 7.4006 will adversely affect the oversight of operating subsidiaries either from a consumer protection or a safety and soundness perspective." 66 Fed. Reg. at 34,789.

4 *Amicus* supports all the arguments made by Wachovia, but addresses primarily the public policy rationale supporting Section 7.4006, in

may be many areas of administrative law in which the federal government allows double regulation by both state and federal administrators, such duplicate regulation is often unduly complex, overly burdensome, and inherently prone to conflicting mandates. *See* 145 Cong. Rec. H12,047 (Sept. 28, 1996) (Conf. Rep. on HR3005, National Securities Markets Improvement Act of 1996, Pub. L. 104-290) (a "system of dual federal and state . . . regulation [may] result[] in a degree of duplicative and unnecessary regulation. . . . [A] dual system of regulation . . . , in many instances, is redundant, costly and ineffective."); Note, *Preemption and Regulatory Efficiency in Federal Energy Statutes*, 103 Harv. L. Rev. 1306, 1308 (1990) ("[S]tate law that duplicates federal licensing should be preempted *per se*. At best duplication wastes regulatory effort, at worst, it subjects federal decisions to local review."); United States Office of Management & Budget, Circular A-4 (Sept. 17, 2003) (Regulatory Analysis), *contained in* National Academies Press, *Valuing Health for Regulatory Cost-Effectiveness Analysis* (2006), at 258, 265, *available at* http://fermat.nap.edu/books/0309100771/html/258.html (stating that "duplicative regulations can also be costly. . . . The local benefits of State regulation may not justify the national costs of a fragmented regulatory system.").

Even though local control sometimes has benefits under certain circumstances, in many cases, such as the national banking industry, the countervailing need for a strong central government to facilitate interstate commerce warrants exclusive federal regulation. *See* C. Boyden Gray, *Regulation*

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regard to which *Amicus* believes it can be of greatest assistance to the Court by raising the concerns of its members with regard to duplicative regulation.

and Federalism, 1 Yale J. on Reg. 93, 95–96 (1983).[5] Exclusive federal regulation of national banking subsidiaries is especially warranted because national banks are a significant part of the national monetary system, "with respect to which the appropriateness of a need for national-level [regulatory] activity is obvious." Gray, 1 Yale J. on Reg. at 110.[6]

National banks are a major contributor to interstate commerce. The banking industry has undergone increasing consolidation in recent years, creating an increasingly nationwide industry. National bank subsidiaries are an integral part of the business of national banks, performing similar

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5 Situations in which exclusive federal regulation is superior to local regulation include:

> (1) federal regulation [that] can prevent burdens on interstate commerce, (2) some socially beneficial programs [that] are easier to adopt as a political matter on a federal level, (3) [situations when] states may compete on the stringency of regulation to the detriment of the nation, and (4) [when] the federal government . . . has greater access to sources of the relatively scarce expertise essential to some types of regulatory programs.

Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. Pitt. L. Rev. 607, 646 (1985). As discussed below, all of these rationales, with the possible exception of beneficial social programs, apply in the case of national banking subsidiaries.

6 One of the purposes of the Constitution's Article Six Supremacy Clause was to allow the federal government to impose a national currency to supersede the numerous conflicting state paper money standards that had debased the value of money and stymied investment. *See* Debate in North Carolina Ratifying Convention, July 29–30, 1788 (Statement of Mr. Davie), *included in* 4 Philip B. Kurland & Ralph Lerner, eds., *The Founders' Constitution*, Article 6, Clause 2, No. 19, at 601, 603 (1987).

operations to those that national banks could perform themselves, especially since the passage of the Gramm-Leach-Bliley Act, Pub. L. 106–102 ("GLBA"). *See* 66 Fed. Reg. at 34,788 ("Operating subsidiaries have often been described as the equivalent of departments or divisions of their parent banks."). Banks service more and more mortgage customers through an increasingly nationwide financial market with mortgage interest rates determined by the national discount rate and long-term federal bond rates. Subsidiaries of national banks offer similar refinancing and equity line plans in numerous states, which similarly affect homeowners throughout the country. The alleged "predatory lending" schemes that concern the Commissioner, Commissioner's Brief at 5, 24–25, are problems that "spill across state lines" and are generally best regulated at the federal level. *See* Office of Management & Budget, Circular A-4 (Regulatory Analysis), at 264. Thus, as for other industries of national scope, exclusive federal regulation of national banks and their operating subsidiaries makes sense because "[t]he wide differences in state laws, as well as the frequent changes in those laws, make it practically impossible for [such an industry] to determine the standards of conduct to which they will be held." Gray, 1 Yale J. on Reg. at 97.[7]

In addition, banking provides similar services nationwide and requires considerable financial expertise to

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7 "This uncertainty injures [national businesses] in a number of ways. Because [national businesses] cannot predict the standards by which their products will be judged, they may be reluctant to introduce . . . innovative products. Shifting and conflicting legal standards also generate extensive and expensive litigation, the costs of which are undoubtedly reflected in higher insurance rates." Gray, 1 Yale J. on Reg. at 97. The parallel in this case would be higher interest rates in the secondary mortgage market primarily serviced by Wachovia Mortgage and other similar national bank subsidiaries.

regulate. Uniform federal regulation is warranted because of the efficiency of a single center for regulatory expertise, instead of fifty different state-based centers, many of which could not be adequately funded or would be located in areas without access to sophisticated academic or economic expertise. *See* Gray, 1 Yale J. on Reg. at 109; Note, 103 Harv. L. Rev. at 1308 (federal regulation can "attract experts from a limited pool [and] solidify uniform, nationwide policy.").

Another, perhaps more pragmatic reason for exclusive nationwide regulation of national banking subsidiaries is the provision of fair treatment to different federal financial institutions in order to create a level competitive playing field. For example, since 1996, federal savings and loan association ("thrift") subsidiaries have received express preemption from state regulation. 66 Fed. Reg. at 34,789 & n.19; 61 Fed. Reg. 66,561, 66,563 (Dec. 18, 1996). Parallel treatment of federal thrift subsidiaries and national bank subsidiaries, exempting both from state regulation, is clearly desirable. Otherwise thrifts would receive unfair and unintended competitive advantages through their exemption from costly duplicative state regulation.

The Commissioner concedes that OCC has the right to regulate national bank subsidiaries, such as Wachovia Mortgage, so that if the Commissioner's position prevailed, they would be subject to duplicative state and federal regulation. Commissioner's Brief at 35–36. The costs incurred by such duplicative regulation inevitably will be passed on to the consumers of the bank's loan services, both directly through higher interest rates and fees,[8] and indirectly because

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8 *See, e.g.*, Gabe de Bondt, *Retail Bank Interest-Rate Pass-Through: New Evidence at the Euro Area Level*, European Central Bank Working Paper Series

the additional costs create a barrier to entry in the secondary loan market, decreasing competition. For the costs of the regulatory burden on small businesses, see W. Mark Crain, Small Business Administration, Office of Advocacy, *The Impact of Regulatory Costs on Small Firms* at 56 (Sept. 2005) (regulatory expenses rest disproportionately on small businesses), *available at* http://www.sba.gov/advo/research/rs264tot.pdf. These higher rates could well have a devastating impact on the small business sector, which is a major component of the economy in both *Amicus*'s focus region of New England and nationwide. The secondary mortgage market is a significant source of capital for small businesses. Small Business Administration, Office of Advocacy, *Financing Patterns of Small Firms: Findings from the 1998 Survey of Small Business Finance* at 12 & n.6 (Sept. 2003), *available at* http://www.sba.gov/ADVO/stats/ssbf_98.pdf; Charles Ou, Small Business Administration, Office of Advocacy, Working Paper, *Statistical Databases for Economic Research on the Financing of Small Firms in the United States* at 12 (2004), *available at* http://www.sba.gov/advo/research/wkp04Ou.pdf. Many small businesses are sole proprietorships, small partnerships, or closely held corporations, who may not

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No. 136 (April 2002) (close to 100% long-term pass-through of changes in market - interest rates to retail rates), *available at* http://www.ecb.int/pub/pdf/scpwps/ecbwp136.pdf; Boris Hoffmann & Paul Mizen, *Interest Rate Pass-through and Monetary Transmission: Evidence from Individual Financial Institutions' Retail Rates*, 71 Economica 99 (2004) (high rates of long-term pass-through); United States Environmental Protection Agency, Office of Air Quality Planning & Standards, Innovative Strategies and Economics Group, *Economic Analysis Resource Document* § 5.1.3.2 (April 1999) ("[U]nder fairly general economic conditions, a regulation's impact on producers is transitory. Ultimately, the costs are passed on to consumers in the form of higher prices."), *available at* http://www.epa.gov/ttn/ecas/econdata/Rmanual2/0.0.html.

qualify for traditional business loans, or may not have the sophistication to apply for them. Instead, they turn to built up equity in their homes accessed through the secondary mortgage market to fund start-up costs and ongoing capital expenditures.

Small businesses, although a significant sector of the business community and an engine of growth when taken as a whole, often operate on the margins of profitability, and small additional costs can make the difference between staying afloat and dissolution. Small businesses in New England (*Amicus*'s primary focus area), in particular, are vulnerable to regulatory costs and difficulties in obtaining financing. *See* Raymond J. Keating, Small Business & Entrepreneurship Council, *Small Business Survival Index 2006* at 2, 5, 10–11, 15–16 (Oct. 2006), *available at* http://www.sbsc.org/Media/pdf/SBSI_2006.pdf (ranking Connecticut 32d, Vermont 42d, Massachusetts 43d, Maine 47th, and Rhode Island 48th, out of 50 states plus the District of Columbia). The additional interest costs attributable to coping with duplicative and possibly conflicting state and federal regulations over national bank subsidiaries providing home equity loans could make or break small businesses nationwide, and especially in New England where they already face higher than average burdens.

OCC therefore reasonably determined, consistent with sound public policy, that uniform federal regulation of the national bank subsidiaries outweighs any benefits of local regulation. Exclusive federal regulation of national banking subsidiaries is manifestly warranted because, among other reasons, (1) they operate as an essential part of the national monetary system, (2) they are heavily involved in interstate commerce, (3) the expertise required to regulate them involves

complex financial analysis best obtained in a centralized federal setting, (4) duplicative regulation incurs passed-through costs that harm consumers of secondary mortgages, in particular small businesses, and (5) fairness warrants similar federal regulatory treatment for federal thrift subsidiaries and national bank subsidiaries.

II. Only federal regulators, such as the OCC, can properly determine whether parallel state regulation of federally regulated national bank subsidiaries is warranted.

The Supremacy Clause contained in Article Six of the Constitution is an integral part of the system of checks and balances inherent in the American federal system. For the American federal system to work, the federal government must be the ultimate decision maker as to the proper balance between state and federal regulations. "The nation, on those subjects on which it can act, must necessarily bind its component parts." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).[9] The first great case enforcing the Supremacy Clause of Article Six of the Constitution was a banking case, *M'Culloch v. Maryland*, which protected branches of the federal bank (the nineteenth century equivalent in many ways of national bank subsidiaries today)[10] from state taxation. National banking has thus been a subject for the federal

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9 If the states were allowed supremacy over the federal government, "the world would have seen ... the authority of the whole society every where [*sic*] subordinate to the authority of the parts; it would have seen a monster in which the head was under the direction of the members." James Madison, *Federalist*, No. 44 (Jan. 25, 1788).

10 National bank subsidiaries are analogous to departments or divisions of their parent banks. 66 Fed. Reg. at 34,788.

government from the foundation of the first Bank of the United States at the beginning of the Republic. *Id.* at 401–02.

M'Culloch remains the bedrock of Supremacy Clause jurisprudence and its wisdom is as pertinent today as it was almost two hundred years ago. The Supreme Court held there that "the states have no power, by taxation *or otherwise*, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." *M'Culloch*, 17 U.S. at 435–36 (emphasis added). While *M'Culloch* involved a state attempt to tax a branch of the national bank, the Supreme Court's discussion of the coercive power of state taxation of federal entities, particularly banks, holds equally true for state regulation of those entities:

> That the power of taxation is one of vital importance, that it is retained by the states, that it is not abridged by the grant of a similar power to the Union, that it is to be concurrently exercised by the two governments—are truths which have never been denied. . . . [T]he . . . paramount [federal] character would seem to restrain . . . , a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union.

M'Culloch, 17 U.S. at 425. Therefore, just as "the power of taxing [the national bank] by the states may be exercised so as to destroy it," *M'Culloch*, 17 U.S. at 427, the power of regulating the national banks and their subsidiaries by the states may be exercised so as to destroy them.

Federal regulatory agencies have several characteristics "that make them well suited to the task of allocating regulatory responsibility between themselves and state agencies [even] when Congress has not explicitly allocated that responsibility by statute." Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. Pitt. L. Rev. 607, 664 (1985). This is particularly true when an industry is national in scope, such as banking, because state-by-state regulation can "create substantial, disproportionate interstate spillovers." *Id.* Indeed, OCC's interpretations of the NBA are entitled to great weight. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996). A rationale federal system requires occasional federal preemption of state attempts to regulate national industries and only the federal government is able to make those decisions without engendering chaos in the federal order. Federal regulators, such as OCC, have the expertise to make decisions as to the proper balance between state and federal regulation of national bank subsidiaries. OCC thoroughly considered the issues and determined that preemption of state regulation was warranted. Its decision was eminently reasonable. This Court should enforce it.

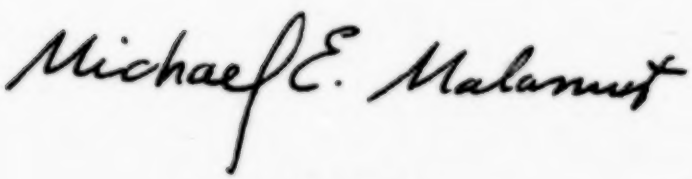
CONCLUSION

For the reasons stated above, this Court should affirm the decisions of the Court of Appeals for the Sixth Circuit below.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,



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Dated: November 3, 2006

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(9)

No. 05-1342

IN THE

Supreme Court of the United States

LINDA A. WATTERS, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MICHIGAN OFFICE OF INSURANCE AND FINANCIAL SERVICES,

Petitioner,

v.

WACHOVIA BANK, N.A. and WACHOVIA MORTGAGE CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICI CURIAE

Along with Petitioner, the State of Michigan, the forty-nine amici States, the District of Columbia and Puerto Rico have the responsibility of regulating corporations - both domestic and foreign - for the purpose of protecting their residents against fraudulent, abusive, and discriminatory practices. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987); *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 208 (1944). Even in the area of banking, which is heavily regulated by the federal government, States have a strong interest "in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds," and retain the "authority to protect the interests of their consumers, businesses, or communities" in this area. H.R. Conf. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2071; *see also Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980) ("[B]anking and related financial activities are of profound local concern . . . . [S]ound financial institutions and honest financial practices are essential to the health of any State's economy and to the well-being of its people.").

Amici therefore urge reversal of the Sixth Circuit Court of Appeals' decision in *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005), which improperly prevented Michigan from enforcing its licensing laws against a state-chartered, nonbank mortgage lender doing business in the State as an operating subsidiary of a national bank. The court preempted these state laws pursuant to a regulation promulgated by the Office of the Comptroller of the Currency ("OCC"), codified at 12 C.F.R. § 7.4006, prescribing that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."

That regulation, and more recent ones promulgated by OCC, seek to oust the States from their traditional consumer protection role with respect to not only national banks, but their operating subsidiaries, which are organized under state law. Section 7.4006, at issue here, was promulgated in 2001 and preempts the application of state law to a national bank's

operating subsidiary as if it were the parent bank. In 2004, OCC also amended its visitorial powers regulation, 12 C.F.R. § 7.4000, seeking for the first time to preempt States from judicially enforcing even their nonpreempted laws against national banks and their operating subsidiaries. On the same day, OCC promulgated preemption regulations at 12 C.F.R. parts 7 and 34, which seek to "clarify" the preemption standard applicable to state laws affecting national banks and their operating subsidiaries. Under the standard adopted by these regulations, state laws that more than "incidentally affect" the business of banking are preempted. *See* 12 C.F.R. §§ 7.4007, 7.4008, 7.4009, and 34.4; *see also* 69 Fed. Reg. 1904, 1910-11 (Jan. 13, 2004).

The scope of these rules and their impact on state enforcement authority is unprecedented. Federal law has never been interpreted to give OCC exclusive authority over a state-chartered corporation, and until 2001, OCC had disclaimed such power. *See* 64 Fed. Reg. 60,092, 60,095 (Nov. 4, 1999); OCC Interpretive Letter, 1988 WL 282227 (June 7, 1988). Also, this Court has long held that States have inherent authority to enforce their nonpreempted laws against national banks, *see First Nat'l Bank v. Missouri*, 263 U.S. 640 (1924), and until now OCC had not taken a contrary position.[1] *See* OCC Interpretive Letter, 1990 WL 362185 (Oct. 26, 1990). And this Court has consistently held that state laws apply to national banks unless they "impair significantly" – not merely incidentally affect – "the exercise of a power that Congress explicitly granted." *Barnett Bank v. Nelson*, 517 U.S. 25, 33 (1996).

If § 7.4006 is allowed to stand, it would render States powerless to protect their residents from abusive and discriminatory consumer practices by state-created entities that are operating subsidiaries of national banks. OCC would usurp that function, even though it is ill-equipped to perform it. OCC's primary responsibility and focus is not the well-being of a State's residents or the state-chartered subsidiary;

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[1] A challenge to 12 C.F.R. § 7.4000 is pending in the Second Circuit. *See The Clearing House Ass'n, L.L.C. v. Spitzer*, No. 05-5996-cv(L) (2d Cir. filed Nov. 7, 2005).

it is, appropriately, the safety and soundness of the bank, as a federally insured depository institution. Indeed, OCC has informed the General Accounting Office ("GAO") that it does not even have procedures for examining compliance with state law. *See* U.S. Government Accountability Office, *OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Consumer Protection Laws to National Banks* 22-23 (2006).

States, by contrast, have greater expertise in enforcing their laws and have enforced state laws prohibiting abusive financial practices more vigorously than has OCC.[2] States are more familiar with local conditions and practices than is the federal government and can more quickly recognize and respond to new predatory practices as they arise. And as OCC increasingly permits national banks and their subsidiaries to expand into nonfinancial areas,[3] the States' expertise and experience in identifying abuses in those areas will become even more essential to protecting consumers' interests.

SUMMARY OF ARGUMENT

In the sparse rulemaking accompanying § 7.4006, OCC gave no statutory basis for preempting the application of state laws to a national bank's operating subsidiary to the same

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[2] For examples of state enforcement efforts against operating subsidiaries under state laws, *see Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001) (state enforcement action under state consumer fraud and deceptive practices law); Complaint, *State v. First Horizon Home Loan Corp.*, No. 272/2004 (N.Y. Sup. Ct. filed Jan. 16, 2004), *available at http://www.oag.state.ny.us/press/2004/jan/Horizon5.pdf* (state enforcement action under state unlawful debt collection and deceptive practices law).

[3] *See, e.g.*, OCC Conditional Approval No. 535 (June 21, 2002) (operating roadside assistance programs constitutes the "business of banking"); OCC Corporate Decision # 97-60 (July 1, 1997) (brokering used car sales and taking a fee for referring customers to "national auto service companies, such as Firestone, Jiffy Lube and other appropriate parties" constitutes the business of banking); *see also* Comptroller of the Currency, *Activities Permissible for a National Bank* 3, 5 (2005), *available at http://www.occ.treas.gov/corpapps/BankAct.pdf* (last visited Aug. 30, 2006) (Medicare and Medicaid counseling and handling benefit payments; providing "welfare-to-work" counseling).

extent that application of these laws to the parent bank is preempted. OCC blithely stated only that the "[§ 7.4006] itself does not effect preemption of any State law; it reflects the conclusions we believe a Federal court would reach, even in the absence of the regulation, pursuant to the Supremacy Clause and applicable Federal judicial precedent." 66 Fed. Reg. 34,784, 34,790 (July 2, 2001). In a subsequent rulemaking, OCC stated that § 7.4006 is based on its interpretation of the "incidental powers" of a national bank as including the use of an operating subsidiary to conduct the business of banking. *See* 69 Fed. Reg. 1895, 1900 (Jan. 13, 2004) (citing 12 U.S.C. § 24 (Seventh)). Because OCC exercises exclusive visitorial power over a national bank, *see* 12 U.S.C. § 484, and because, according to OCC, operating subsidiaries are "no more than incorporated department of the bank," OCC believes it can also exercise exclusive visitorial power over the subsidiaries as well. *See* 69 Fed. Reg. at 1900.

By its express terms, however, § 484's exclusive visitorial powers' provision applies only to a "national bank." It is not surprising, then, given that a state-chartered nonbank corporation cannot be described as a "national bank," that the Sixth Circuit did not uphold § 7.4006 as a correct or even reasonable interpretation of the National Bank Act ("NBA").[4] *Cf. Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 375 (1986) (Federal Reserve Board cannot by regulation alter the definition of "bank" in the Bank Holding Company Act); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 626 (1971) (Comptroller cannot narrow the meaning of "securities" in 12 U.S.C. § 24 (Seventh)).

Instead, the court viewed § 7.4006 as a preemptive regulation, and following the framework set forth in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982),

[4] That no circuit to have addressed the issue, nor the United States Solicitor General, has attempted to defend § 7.4006 as an interpretation of the NBA only highlights the absurdity of that exercise. *See Nat'l City Bank v. Turnbaugh*, 2006 U.S. App. Lexis 20538, *8-*11 (4th Cir. Aug. 10, 2006); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314-16 (2d Cir. 2005); *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 962-63 (9th Cir. 2005); *see also* Brief for the United States as Amicus Curiae, *Burke v. Wachovia Bank, N.A.*, No. 05-431 (U.S. filed May 11, 2006).

asked whether § 7.4006 was a reasonable exercise of congressionally delegated preemption power. *Watters*, 431 F.3d at 560. Under *de la Cuesta*, a regulation validly preempts state law if (1) the agency intended to preempt state law; (2) it had the statutory authority to do so and the regulation was within the scope of that delegation; and (3) the agency's policy choice to exercise that authority was reasonable. *See* 458 U.S. at 153-54.

Even if OCC had attempted to justify § 7.4006 as a preemptive regulation under the *de la Cuesta* framework – which it did not[5] – that defense fails. In applying *de la Cuesta*, the Sixth Circuit mistakenly viewed the question of the agency's authority to promulgate the challenged regulation through the lens of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), *see Watters*, 431 F.3d at 561, when it should have considered the question de novo, *see, e.g., Gonzales v. Oregon*, 126 S. Ct. 904, 915 (2006); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). That is, instead of asking whether Congress intended to give OCC authority, to decide whether to preempt all state visitorial power over operating subsidiaries, the court asked whether Congress had directly spoken to the precise question of whether to exclude operating subsidiaries from the scope of the Comptroller's exclusive visitorial power over national banks. Finding no such unambiguous intent, the court deferred to OCC's regulation. *Watters*, 431 F.3d at 561-63.

But it is evident that Congress did not authorize OCC to preempt state regulation of any state-chartered entities. OCC's primary source of rulemaking authority, 12 U.S.C. § 93a, is a limited grant of authority to promulgate regulations that implement responsibilities OCC has been granted by statute. To be sure, part of OCC's responsibility is enforcement of the

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[5] "[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 50 (1983). The sound rationale for this rule is demonstrated in this case, where § 7.4006's rulemaking supplies no basis for finding a significant interference with federal law. *See NLRB v. Kentucky River Cnty Care, Inc.*, 532 U.S. 706, 714 n.1 (2001) (refusing to accept "a post hoc rationale for reasoning supplied by" the agency).

NBA, which includes interpreting the substantive meaning of the Act's provisions. But while OCC can render opinions on whether a state law conflicts with the NBA, nothing in the text or history of the Act gives OCC the power to promulgate legislative rules preempting state law, or to act as the primary regulator of state-chartered entities.

Given OCC's circumscribed rulemaking authority and the regulatory scheme embodied in the NBA – which permits OCC to exercise exclusive visitorial power over national banks but affords it only limited power to examine bank affiliates – it would be illogical to presume that Congress somehow implicitly granted OCC the discretion to exercise exclusive visitorial power over state-chartered entities. Such power would push Congress's own legislative authority to its outer limits by essentially federalizing state-chartered entities; it would derail the balance of federal and state regulatory authority over bank and nonbank entities; and it would destroy the competitive balance between the state and national banking systems that is embodied in the NBA.

Finally, OCC seeks to defend § 7.4006 by pointing to a similar regulation promulgated by the Office of Thrift Supervision ("OTS") that preempts state law as to operating subsidiaries of federal thrifts. This comparison is devoid of content and decidedly unpersuasive. It rests only on the fact that both national banks and federal thrifts are federally chartered, and ignores Congress' decision to give OTS more expansive rulemaking authority than that granted to OCC.

ARGUMENT

I

AN AGENCY'S ASSESSMENT OF ITS OWN AUTHORITY TO PREEMPT STATE LAW IS NOT SUBJECT TO DEFERENCE

Contrary to the Sixth Circuit's assumption, *Chevron* is implicated only where Congress has first delegated to an agency rulemaking authority to interpret a statute that it is charged with administering. Whether Congress has delegated that authority is a precondition to the application of *Chevron*, not its result. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (*Chevron* deference is warranted only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority"); *Gonzales*, 126 U.S. at 916 ("*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official.").

Accordingly, an agency's conclusion about whether Congress has delegated to it authority to act cannot itself be entitled to deference, for the self-evident reason that "[a]n agency may not confer power upon itself." *La. Pub. Serv. Comm'n*, 476 U.S. at 374. For example, a court does not defer to an agency's determination of whether a statute is ambiguous and thus delegates authority to the agency to fill the statutory gap. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (concluding after de novo review that the overall regulatory scheme of the Food, Drug, and Cosmetic Act made clear that Congress had forbidden the FDA to assert jurisdiction over tobacco). Similarly, "[w]hether [a] statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 473 (2001). Nor does a court defer to an agency on whether its

action is within the scope of its delegated authority. *See Gonzales*, 126 S. Ct. at 916.

This fundamental separation of powers principle carries special weight when the question involves preemption of state law, because of the additional federalism concerns at play. As this Court has frequently explained, "'an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.'" *New York v. FERC*, 535 U.S. 1, 18 (2002) (quoting *La. Pub. Serv. Comm'n*, 476 U.S. at 374). Thus, the question whether Congress has delegated to an agency the power to preempt state law is reviewed de novo.

For example, in *Gonzales*, the Court held that the Attorney General did not have the authority to interpret the Controlled Substances Act ("CSA") to preempt an Oregon law permitting physician-assisted suicide. *Gonzales*, 126 S. Ct. 904. The Court declined to apply *Chevron* deference to the rule's interpretation of the ambiguous term "legitimate medical purpose" in the CSA because - after reviewing the CSA's delegation provision - it concluded that the rule was beyond the scope of that delegation. *Id.* at 918. Although the Court described the delegation provision as "oblique," it considered the delegation question de novo, reviewing the text of the delegation provision, the functions of the Attorney General, and the design of the CSA. *Gonzales*, 126 S. Ct. at 916-21.

Similarly, in *New York v. FERC*, in concluding that the Federal Energy Regulatory Commission acted within the scope of its delegated authority in seeking to preempt state law, the Court stated that it would interpret the authorizing statue "without any presumption one way or the other." 535 U.S. at 18. The Court reviewed the text of the Federal Power Act, its extensive legislative history (dating back to 1935), and relevant energy policy, without applying *Chevron* or otherwise deferring to FERC's interpretation. *Id.* at 18-25.

These more recent holdings are consistent with *Louisiana Public Service Commission*, an earlier regulatory preemption case in which the Court held that the Communications Act of

1934 did not authorize the FCC to preempt depreciation methods used by States to set rates for intrastate telephone service. The Court analyzed the "language, structure, and legislative history of the Act" without reference to *Chevron* or deference to the agency, 476 U.S. at 359, even though, "[l]ike many statutes, the Act contain[ed] some internal inconsistencies, vague language, and areas of uncertainty," *id.* at 379. *See also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-85 (1999) (considering whether the 1996 Telecommunications Act authorized FCC to set rates for intrastate telephone service that would preempt contrary state rules, without giving any deference to the FCC); *cf. Verizon Communications Inc. v. FCC*, 535 U.S. 467, 501-02 (2002) (deferring to FCC on whether the specific method for setting rates devised by FCC under the 1996 Act was reasonable).

Likewise, in *City of New York v. FCC*, 486 U.S. 57, 66-69 (1988), the Court did not rely on *Chevron* to conclude that the 1984 Cable Act authorized the FCC to preempt state and local technical standards for cable television signals. Instead, the Court conducted an independent review of the text, legislative history, and regulatory background of the Act. While the Court did twice cite to FCC findings, it did so not in deference to the agency's interpretation of the Cable Act, but in support of the Court's own reading of the statute as sanctioning the FCC's decade-old preemption of local technical standards, and thereby authorizing continuing preemption. *Id.* at 68 n.4, 69; *see also Capitol Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699-700 (1984) (holding, without deference to the agency, that Congress had delegated to the FCC broad regulatory authority).

And in *de la Cuesta* itself, considered the seminal regulatory preemption case, it was the Court's own detailed analysis of the specific "language and history of [the Home Owners' Loan Act ("HOLA")]," 458 U.S. at 159, that convinced it both that Congress had delegated to the Federal Home Loan Bank Board ("FHLBB")[6] the power to promulgate regulations exempting federal savings and loans from the requirements

[6] Now OTS. *See* Pub. L. No. 101-73 §§ 401-02, 103 Stat. 183, 354-60 (1989); 54 Fed. Reg. 34,637 (Aug. 21, 1989); 54 Fed. Reg. 49,411 (Nov. 30, 1989).

of state law, *id.* at 159-67, and that the specific regulation at issue expressly preempting state restrictions on certain clauses in mortgage agreements was within the scope of that authority, *id.* at 167-69. It was only after reaching those independent conclusions that the Court turned its attention to the "wisdom of the Board's policy decision" to preempt state law. *Id.* at 169. Although that policy was contested, the Court deferred to the Board regarding the economic soundness of its approach, concluding that it "reasonably exercised the authority, given to it by Congress," to "ensure the financial stability of" federal thrifts. *Id.* at 170; *see also United States v. Shimer*, 367 U.S. 374, 382-83 (1961) (deferring not to whether the agency's regulations were authorized by statute, but to its reasonable policy choice in deciding to preempt state law).

Accordingly, the Sixth Circuit erred by applying *Chevron* to the question of the agency's authority to promulgate a preemptive regulation. The question of whether OCC acted within the scope of its delegated rulemaking authority in enacting § 7.4006 is decided prior to application of *Chevron* or other deferential review. The question is not, as the court below framed it, whether Congress has spoken directly to the issue – as it would be at the first step of *Chevron* – but rather, whether Congress intended to authorize OCC to make the preemption decision it did.[7]

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[7] Even if the question in this case were not viewed as one of regulatory preemption, as the Sixth Circuit framed it, but as the agency's interpretation of a bank's "incidental powers," 12 U.S.C. § 24 (Seventh), *Chevron* deference would still be inappropriate. In that event, OCC would not be simply defining the incidental powers of a national bank as including a bank's ability to own an operating subsidiary, which the agency has already done, *see* 12 C.F.R. § 5.34; it would be making the additional determination that the bank's power to own a subsidiary preempts application of state law to that subsidiary. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996) (assuming without deciding that the question of a statute's preemptive effect "must always be decided *de novo* by the courts"); *Medtronic Inc. v. Lohr*, 518 U.S. 470, 512 (1996) (O'Connor, J., concurring in part and dissenting in part) ("It is not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference . . . .") *Nixon v. Mo. Mun. League*, 541 U.S. 125, 128-41 (2004) (affirming FCC's interpretation of an express preemption provision without the benefit of *Chevron* deference)..

II

SECTION 7.4006 IS NOT AUTHORIZED BY THE NBA

Upon de novo consideration, it is clear that Congress did not intend to provide OCC with rulemaking authority to preempt state regulation of state-chartered corporations.[8] OCC first allowed national banks to use operating subsidiaries to engage in the business of banking in 1966. *See* 31 Fed. Reg. 11,459 (Aug. 31, 1966). It justified that regulation as an exercise of its authority to interpret a national bank's "incidental powers," set forth at 12 U.S.C. § 24 (Seventh). *See* 31 Fed. Reg. at 11,460; *see also Nationsbank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257-60 (1995) (deferring to OCC's opinion that selling annuities is within a bank's "incidental powers"). OCC now attempts to use that same statutory authority to shield subsidiaries from application of state law to the same extent that the parent bank is protected. OCC lacks the power to do this, and § 7.4006 is therefore invalid. *Cf. Iowa Utils. Bd.*, 525 U.S. at 427 (Breyer, J., concurring in part and dissenting in part) ("FCC's reach has exceeded its legal grasp").

A. OCC Does Not Have Authority to Promulgate a Legislative Rule Preempting State Law.

"[T]he best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *City of New York*, 486 U.S. at 66 (quoting *La. Pub. Serv. Comm'n*, 476 U.S. at 374); *accord Gonzales*, 126 S. Ct. at 916. The principal grant of rulemaking authority to OCC empowers the Comptroller "to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a. As the text of that provision

[8] Section 7.4006 does not meet the other *de la Cuesta* elements, either. For example, OCC disclaims any intent to preempt state law, *see* 66 Fed. Reg. at 34,790, and accordingly has made no attempt to satisfy applicable standards of conflict preemption. *See Barnett Bank*, 517 U.S. at 33. Nor is the regulation a reasonable exercise of any preemptive power OCC might have, for the reasons discussed here and in the briefs of Petitioner and other amici.

makes clear, OCC's rulemaking authority under § 93a is only "as broad as OCC's statutory responsibilities, defined piecemeal throughout the [National] Bank Act." *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d at 958.

Section 93a is similar to the grant of rulemaking authority in the CSA that was at issue in *Gonzales*. The CSA authorizes the Attorney General to promulgate rules and regulations "which he may deem necessary and appropriate for the efficient execution of his functions" under the Act. *Gonzales*, 126 S. Ct. at 917. In ruling that a regulation promulgated by the Attorney General fell outside the scope of that delegation, the Court distinguished between narrow delegation provisions such as that in the CSA, whose scope is defined by reference to the statutory responsibilities of an administrative officer, and more expansive provisions that entrust agencies with rulemaking authority "to carry out or effect all provisions" of a statute. *Id.*[9] Section 93a is plainly of the more circumscribed variety.

The legislative history of § 93a confirms that it is defined in reference to the Comptroller's statutory responsibilities. The Senate floor manager explained the provision as follows:

> [Section 93a] is only available to carry out the responsibilities of the [OCC and] carries with it no new authority to confer on national banks powers which they do not have under existing substantive law. To give national banks authority under this rulemaking provision which they otherwise do not possess under existing substantive law would not be carrying out the responsibilities of the [OCC] since only Congress can define those responsibilities so as to confer powers on national banks.

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[9] As examples of the more expansive provisions, the Court cited the Telecommunications Act, 47 U.S.C. § 201(b), which delegates to the FCC the authority to "'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act," and the Truth in Lending Act, 15 U.S.C. § 1604(a), which delegates to the Federal Reserve Board the authority to prescribe regulations "as, in the judgment of the Board, 'are necessary or proper to effectuate the purpose of' the statute." *Gonzales*, 126 S. Ct. at 916.

126 Cong. Rec. 6902 (1980) (remarks of Sen. Proxmire); *see also* H.R. Rep. No. 96-842, at 83 (1980), *reprinted in* 1980 U.S.C.C.A.N. 298, 313 (§ 93a "carries no authority to permit otherwise impermissible activities of national banks"); 126 Cong. Rec. 6971 (1980) (Rep. St. Germain, House floor manager) (same).

While OCC's responsibilities include enforcement of the NBA, and the Comptroller's deliberative conclusions as to the meaning of that law are entitled to deference, *see Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987), that power does not include the authority to promulgate a regulation carrying the force of law which determines the preemptive scope of the NBA. *See Gonzales*, 126 S. Ct. at 919 ("a delegation of authority to an agency to promulgate . . . *'standards'* did not include the authority to decide the pre-emptive scope of the federal statute because 'no such delegation regarding the statute's enforcement provisions is evident in the statute" (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (brackets omitted))). When Congress has delegated authority to make legislative rules preempting state laws, it generally has done so directly. *See, e.g.*, 12 U.S.C. § 1464(a) (HOLA); 30 U.S.C. § 1254(g) (Surfacing Mining Control and Reclamation Act); 47 U.S.C. § 253(d) (Telecommunications Act of 1996); 49 U.S.C. § 5125(d) (Hazardous Materials Transportation Act). The NBA lacks any such authorization.

The historical background of the NBA helps explain why Congress has not afforded the Comptroller power to preempt state law. Congress first authorized the chartering of national banks in 1863. From the beginning, States were denied the right to examine the newly created national banks or monitor their financial conditions, *see* National Currency Act, ch. 58, § 51, 12 Stat. 665, 680 (now codified at 12 U.S.C. § 484), but state law otherwise generally applied to the operation of the banks absent a conflict with federal law, *see Nat'l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1869) (national banks "are governed in their daily course of business far more by the laws of the State than of the nation"); *accord Waite v. Dowley*, 94 U.S. 527, 533 (1877); *McClellan v. Chipman*, 164 U.S. 347 (1896).

To this day, the Court recognizes that state laws apply to national banks unless they "impair significantly[] the exercise of a power that Congress *explicitly granted*." *Barnett Bank*, 517 U.S. at 33 (emphasis added); *see also Atherton v. FDIC*, 519 U.S. 213, 223 (1997) ("[t]o point to a federal charter by itself shows no conflict[or] threat") (collecting cases); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 (1954); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944) ("This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions."); *Lewis v. Fid. & Deposit Co.*, 292 U.S. 559, 564-66 (1934). And Congress recently expressly reaffirmed the importance of subjecting national banks to certain state laws to protect significant state interests. *See* 12 U.S.C. § 36(f) (host state laws regarding community reinvestment, consumer protection, fair lending, and branching apply to out-of-state national bank branches); H.R. Conf. Rep. No. 103-651, at 53, *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074 (noting States' "strong interest" in the activities of both national and state banks operating in their jurisdictions); *see also* 12 U.S.C. § 43 (imposing heightened procedural requirements for OCC opinion letters and interpretive rules that determine that federal law preempts state community reinvestment, consumer protection, fair lending, and branching laws).

Section § 93a's limited delegation thus cannot be read as an implicit grant of authority to OCC to promulgate legislative rules preempting state laws, which generally apply to national banks unless they conflict with an explicit grant of authority in the NBA. In the words of the former Comptroller, "the OCC has no self-executing power to preempt state law." Comptroller of the Currency John D. Hawke, Jr., Remarks Before the Women in Housing and Finance (Feb. 12, 2002), *available at http://www.occ.treas.gov/ftp/release/2002-10a.txt*. Rather, the Comptroller "renders opinions, using well recognized standards developed by the courts, as to whether or not a federal law does, or does not, preempt a state law." GAO Report No. B-284372, *Role of the Office of Thrift Supervision and Office of the Comptroller of the Currency in the Preemption of*

State Law (Feb. 7, 2000), at 38 (letter from Chairman Hawke, Jan. 31, 2000); *id.* ("OCC does not choose 'to preempt;' it is federal law that preempts").

B. The Comptroller Is Not Authorized to Act as the Primary Regulator of a Bank's Operating Subsidiaries.

Nor has Congress given the Comptroller power to exercise primary regulatory authority over a national bank's operating subsidiaries or any other state-chartered entity, and indeed, Congress has expressed an affirmative intent not to do so. Pursuant to the NBA's regulatory structure, while the Comptroller has the responsibility to examine and report on the condition of a national bank, and its visitorial power over that bank is exclusive, it does not have the same degree of control over the bank's subsidiaries.

The Comptroller's visitorial power over national banks is authorized by 12 U.S.C. § 481. He is required to "examine," or "visit,"[10] national banks and make a report of their "condition." *Id.* He is also authorized to examine the banks' affiliates, but the purpose of that examination is not to discover the condition of the affiliate, per se, but to "disclose fully the relation between such bank and such affiliates and the effect of such relations upon the affairs of such bank." *Id.*

In addition to submitting to examination, each national bank is required to submit to the Comptroller periodic "reports of condition," to include "in detail" the bank's "resources and liabilities," *id.*, and "payment of dividends," *id.* § 161(b). Submission of corresponding affiliate reports is the duty of the parent bank, not the affiliate, and like the affiliate examination, they are not targeted at the affiliate per se, but are required to contain only such information as "shall be necessary to disclose fully the relations between such affiliate

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[10] The Congress that enacted the NBA used "visitation" and "examination" interchangeably. *See, e.g.*, Cong. Globe, 37th Cong., 3d Sess. 824 (1863); *see also Dunn v. O'Connor*, 89 F.2d 820, 824 (D.C. Cir. 1937) (discussing another early statute that referred to the Comptroller's examination power as "visitorial powers.").

and such bank and to enable the Comptroller to inform himself as to the effect of such relations upon the affairs of such bank." *Id.* § 161(c). If the affiliate refuses to submit to an examination or provide information to the Comptroller, or pay any assessments, fees or charges levied by the Comptroller, recourse is with the bank, not the affiliate. *Id.*[11]

The most notable statutory difference in the NBA's treatment of national banks and their affiliates is that OCC's visitorial powers over national banks is virtually exclusive, but its power over affiliates is not. 12 U.S.C. § 484, entitled "Limitation on visitorial powers," provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or . . . exercised or directed by Congress." Section 484, by its terms, applies only to national banks. Neither it, nor any other provision of the NBA, limits visitorial powers over a national bank's affiliates.[12]

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[11] An operating subsidiary fits squarely within the definition of "affiliate" in this scheme. Indeed, the Comptroller's only power to examine an operating subsidiary flows from its power to examine an "affiliate," which is a category that includes not only operating subsidiaries, but also, for example, other types of subsidiaries and bank holding companies. *See* 12 U.S.C. § 221a(b) (defining "affiliate" as, *inter alia*, a corporation or similar entity controlled by a national bank); 12 C.F.R. § 5.34(e)(2), (3) (defining an "operating subsidiary as a corporation or similar entity controlled by a national bank, and that engages in only the activities that are authorized for the bank); *see also* S. Rep. No. 73-77, at 10, 16, 17 (1933); 77 Cong. Rec. 3835-36 (1933) (remarks of Rep. Steagall).

When Congress intended to differentiate between types of affiliates, for example with respect to restrictions on financial transactions between the bank and its affiliates, it did so explicitly. *See, e.g.*, 12 U.S.C. § 371c(b)(2)(A); 12 U.S.C. § 371c-1(d)(1); S. Rep. No. 73-77, at 15, 17 (explaining that certain types of affiliates are exempted from § 371c).

[12] Indisputably, a subsidiary of a national bank is not itself a national bank. Some of the more obvious indicia are that the subsidiary does not have a federal charter, *see* 12 U.S.C. § 27, it is not a member of the Federal Reserve System, *see* 12 U.S.C. §§ 282, 501a, and it is not required to maintain FDIC depository insurance, *see* 12 U.S.C. §§ 1814, 1815.

Moreover, because it is a basic tenet of corporate law that a subsidiary has a corporate status independent of its parent bank, had Congress

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Congress's failure to amend § 484 to limit visitorial powers over operating subsidiaries only bolsters the conclusion that it did not intend the Comptroller to serve as their primary regulator. Section 484 was last amended in 1983, *see* Act of Jan. 12, 1983, Pub. L. No. 97-457, § 23(a), 96 Stat. 2507, 2510, when Congress made minor technical changes, and the provision has remained essentially unchanged since it was first enacted in 1863, *see* National Currency Act, § 51, ch. 58, 12 Stat. 665 (1863). In the meantime, Congress gave OCC limited power to examine affiliates in 1933, *see* Banking Act of 1933, § 5(c), ch. 89, 48 Stat. 162, 165 (1933), and OCC has, since 1966, permitted national banks to operate through subsidiaries. *See* 31 Fed. Reg. at 11,459. Had Congress wished to extend OCC's powers over these subsidiaries, it had ample opportunity to do so. *Cf. Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 448-49 (2005) (if Congress had intended a statutory provision to read the way respondent suggested, it would have used different language).

Other federal banking laws are consistent with Congress's affirmative intent not to assign the Comptroller the role of primary regulator of any state entities. For example, for purposes of the Alternative Mortgage Transactions Parity Act of 1982, state-chartered entities - including operating subsidiaries of national banks - are subject to OTS regulation, while national banks are governed by OCC. *See* 12 U.S.C. § 3803(a); 12 C.F.R. § 34.24; *cf. Gonzales*, 126 S. Ct. at 921 (determining that the structure of the CSA conveys an unwillingness to cede power to the Attorney General).

OCC has disregarded this intent not to permit the Comptroller to entrench himself as the sole regulator of a bank's subsidiaries. Under the guise of interpreting a national bank's incidental powers, *see* 69 Fed. Reg. at 1900, it has

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intended to treat operating subsidiaries and national banks as one for purposes of § 484's visitorial powers' provision, it must be assumed that it would have done so explicitly. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 474, 476 (2003); *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998); *see also* Br. for the Nat'l Ass'n of Realtors as *Amicus Curiae* in Supp. of Pets. 8-11.

preempted virtually all state regulation of these state corporations. The notion that this provision gives the Comptroller "such broad and unusual authority through an implicit delegation . . . is not sustainable." *Gonzales*, 126 U.S. at 921; *cf. Iowa Utils. Bd.*, 525 U.S. at 381 n.8 (FCC could not regulate aspects of intrastate communication not governed by the 1996 Telecommunications Act "on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction").

C. Congress Would Not Implicitly Empower a Federal Agency to Act as the Primary Regulator of State-Created Entities or Otherwise Undermine the Dual Banking System.

Against this evidence that Congress imbued the Comptroller with only those powers enumerated by statute – which plainly do not include comprehensive or exclusive regulatory authority over a national bank's operating subsidiaries – Respondents would have this Court presume that Congress has implicitly allowed the Comptroller to arrogate to himself exactly that power. This position is untenable. "[t]he background principles of our federal system . . . belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States[]. . . ." *Gonzales*, 126 S. Ct. at 925.

Operating subsidiaries of national banks are generally incorporated under state law. *See* 12 C.F.R. § 5.34(e)(2). "A corporation is a juristic person organized by government to accomplish certain ends, which may be public or quasi-public. . . They have been given corporate capacity in the belief that their creation will advance the common weal." *Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 336-37 (1935). Incorporation under the laws of a State creates obligations as well as privileges for a corporation. The corporation gains the privilege of conducting business in that State as a corporation, with the powers attendant with that status. In return, the State may condition that privilege as it

deems appropriate for the protection of its citizens. *See CTS Corp.*, 481 U.S. at 89; *BT Inv. Managers, Inc.*, 447 U.S. at 38; *Union Brokerage Co.*, 322 U.S. at 208. Indeed, "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations." *CTS Corp.*, 481 U.S. at 89. "How they shall be formed, how maintained and supervised, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision." *Hopkins*, 296 U.S. at 337; *accord Chicago Title & Trust Co. v. 4136 Wilcox Bldg. Corp.*, 302 U.S. 120, 127 (1937) ("How long and under what terms a state-created corporation may continue to exist is a matter exclusively of state power.").

If valid, § 7.4006 would presumably render state-chartered operating subsidiaries subject to OCC's regulations on corporate practices, *see* 12 C.F.R. pt. 7, subpt. B, rather than those provided by state law. Subpart B includes, among other things, requirements for holding shareholders' meetings, electing directors, voting, stock ownership, compensation plans, and stock transfers. Section 7.4006 would also nullify state regulators' authority over these state entities, *see* 12 C.F.R. § 7.4000, including the state licensing requirement at issue here, *see* 66 Fed. Reg. at 34,788. In sum, § 7.4006 would subject state corporations to federal law in most, if not all, all significant respects.

To the extent that § 7.4006 essentially federalizes state-chartered corporations without the consent of the State, and without a finding of conflict with some superior federal interest, it would raise significant Tenth Amendment concerns. *See Hopkins*, 296 U.S. at 338. No such significant interference with federal law has been identified by § 7.4006's rulemaking, which cites as the basis for the preemption merely that the subsidiary is a "convenient and useful corporate form" through which the bank can do business. 66 Fed. Reg. at 34,788.

Nor is it evident that a conflict with a federal interest could be identified. For example, it would take more than OCC's bald and fundamentally incorrect assertion that a subsidiary

is equivalent to a department of the parent bank, *id.*, to show significant impairment from state licensing of a state subsidiary, especially since the bank is generally shielded from liability for the actions of its subsidiaries. *See Union Brokerage Co.*, 322 U.S. at 208 (state licensing law not preempted by federal regulation of customhouse brokers because the federal law dealt with the manner in which the business was carried out, and the State was concerned with safeguarding the interests of its own people). Moreover, state regulation of financial subsidiaries[13] and other types of bank affiliates is not affected by § 7.4006. Given the ease of converting from one type of affiliate to another,[14] it is clear that the federal power being flexed is "not exclusive, but at most concurrent," *Hopkins*, 296 U.S. at 338, and that "[w]hat is really troubling [Respondents]" is not a conflict between state and federal law, but "their sense that state regulators will not allow them sufficient revenues." *La. Pub. Serv. Comm'n*, 476 U.S. at 386.[15]

Congress does not casually authorize an agency to take an action that would raise significant constitutional concerns. *See SWANC v. U.S. Army Corps. Of Eng'rs*, 531 U.S. 159, 172 (2001) (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)); *cf. Whitman*, 531 U.S. at 472. But § 7.4006 does just that, by transferring all significant regulatory authority over state-chartered corporations from the state to the federal government, without

[13] "Financial subsidiary" is defined in 12 U.S.C. § 24a and 12 C.F.R. § 5.39.

[14] *See* 12 C.F.R. § 5.34(e)(5)(iv), (vi). Soon after § 7.4006 was promulgated, Petitioner Wachovia Mortgage Corporation converted to an operating subsidiary of Petitioner Wachovia Bank, N.A., and suddenly claimed preemption of Michigan's licensing laws. *See Watters*, 431 F.3d at 558.

[15] That the Commerce Clause may permit federal regulation of operating subsidiaries does not resolve the Tenth Amendment concern, as OCC suggests, *see* 69 Fed. Reg. at 1901, as the question is not whether the federal government can regulate state chartered subsidiaries, but whether it can do so exclusively without the States' consent and without satisfying conflict preemption standards.

the consent of the chartering jurisdiction and apparently with no legitimate basis for preemption. *See Hopkins*, 296 U.S. at 338.

Moreover, that concern is heightened where, as here, the agency action "alters the federal-state framework by permitting federal encroachment upon a traditional state power," *SWANC*, 531 U.S. at 173; *see also Gonzales*, 126 S. Ct. at 925. Section 7.4006 does this by intruding on traditional state authority to regulate the internal governance and operations of state-created entities. "The longstanding prevalence of state regulation in [the area of corporate governance] suggests that, if Congress had intended to pre-empt all state laws [in this area], it would have said so explicitly." *CTS Corp.*, 481 U.S. at 86; *see also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544-46 (1994) (infringing on essential state interest in securing real estate requires clear statement); *cf. Nixon*, 541 U.S. at 140-41 (preemption of state arrangements for conducting its own government requires clear statement); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (infringing on core state function of regulating its judiciary requires clear statement).

Finally, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman*, 531 U.S. at 468. Thus, it would be odd, to say the least, for Congress to have authorized OCC - an agency funded almost exclusively by the national banks that it oversees - to so profoundly and predictably upset "the policy of competitive equality" between state and national banks "firmly embedded in the statutes governing the national banking system." *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 133 (1969); *see also First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966); *Lewis v. Fid. & Deposit Co.*, 292 U.S. at 564-66. But the regulation does precisely that by encouraging state-chartered banks to convert to a federal charter to avoid enforcement of state law against their subsidiaries.

III

AN UNTESTED OTS RULE CANNOT SERVE AS PRECEDENT FOR SECTION 7.4006

OCC defends its rule by comparing it to a similar regulation promulgated by OTS, 12 C.F.R. § 559.3(n), governing application of state law to operating subsidiaries of federal thrifts, *see* 69 Fed. Reg. at 1901 even though OTS's regulation has never been sanctioned by any federal appellate court or by Congress. *See* 66 Fed. Reg. at 34,789. In any event, OCC's reasoning behind the comparison – that both national banks and federal thrifts have federal charters, *id.*, is utterly vapid.

OTS operates under a more expansive grant of authority than does OCC, which is evident by comparing the purpose, text, and legislative history of HOLA and the NBA. A federal thrift "is not a national bank and the powers and duties of the two materially differ. As to national banks, Congress expressly left open a field for state regulation and the application of state laws . . . ." *People v. Coast Fed. Sav. & Loan Ass'n*, 98 F. Supp. 311, 319 (S.D. Cal. 1951) (quotation marks omitted), *cited in de la Cuesta*, 458 U.S. at 145.

In contrast to the narrow grant of rulemaking authority to OCC discussed above, *see supra* at 11-15, this Court has described OTS's regulatory authority as affording it the power to preempt conflicting state law. *de la Cuesta*, 458 U.S. at 160-62; *id.* at 159 n.14 (qualifying that the Court was not deciding whether FHLBB occupies the field of federal savings and loan regulation); *see also id.* at 171 (O'Connor, J., concurring) (FHLBB's authority to preempt state law is not limitless). OCC's power is not nearly so expansive, and does not include the power to preempt state law, as discussed above.

OTS's broader authority is manifested by the text and legislative history of HOLA, which stand in stark contrast to that of the National Bank Act. HOLA was "a product of the Great Depression . . . [and] was intended to 'provide emergency relief with respect to home mortgage indebtedness' at a time when as many as half of all home loans in the country

were in default." *Id.* at 159 (citations omitted). Congress enacted HOLA as a "radical and comprehensive response to the inadequacies of the existing state system." *Id.* at 160. Because it enacted the statute hurriedly in order "to provide for the 'relief of the man who is about to lose his home,'" setting out the general framework and leaving the details to the FHLBB, Congress gave the FHLBB "broad discretion to regulate the newly created federal savings and loans." *Id.* at 163-64 (citation omitted).

This grant of authority is set forth in HOLA's expansive delegation provision, which is essentially the same today as it was at the time *de la Cuesta* was decided, and is notably broader than anything in the NBA:

> In order to provide thrift institutions for the deposit of funds and for the extension of credit for homes, [OTS] is authorized, under such regulations as [OTS] may prescribe - (1) to provide for the organization, incorporation, examination, operation, and regulation of [federal thrift] associations . . . and (2) to issue charters therefor, *giving primary consideration to the best practices of thrift institutions in the United States.*

12 U.S.C. § 1464(a)(1) (emphasis added). OTS's mandate to consider the "best practices" of certain state institutions plainly indicated to the Court that Congress "expressly contemplated, and approved, the [FHLBB]'s promulgation of regulations superseding state law." *de la Cuesta*, 458 U.S. at 162. The NBA has no analogous provision governing the Comptroller's authority.[16]

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[16] While HOLA does have a provision similar in wording to § 93a, that provision does not encompass the authority granted OTS in § 1464(a)(1). *See* 12 U.S.C. § 1 (providing the Comptroller with the same authority provided OTS in § 1462a(b)(3), but not citing the "best practices" provision, § 1464(a)(1), discussed in *de la Cuesta*).

As this Court has noted, HOLA's legislative history stresses the need for uniformity among the federal savings and loans: "Congress delegated to [FHLBB] broad authority to establish and regulate 'a uniform system of savings and loan institutions, . . . with the force of the government behind them,'" *Id.* at 166 (brackets omitted). That Congress does not see the same need for uniformity in the national banking system is apparent given that OTS has for decades permitted federal thrifts to branch interstate without regard to conflicting state law, *see* GAO Report No. B-284372, at 24 & n.25, even while Congress has within the last decade provided that state branching and other laws apply to national banks, *see* Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, 12 U.S.C. § 36(f); H.R. Conf. Rep. No. 103-651, at 53; *see also* GAO Report No. B-284372, at 22 & n.15 (citing cases to the effect that federal thrifts are "uniquely federalized institutions – even distinguishable from national banks.").

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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No. 05-1342

IN THE

Supreme Court of the United States

LINDA A. WATTERS, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MICHIGAN OFFICE OF FINANCIAL AND INSURANCE SERVICES,
Petitioner,

v.

WACHOVIA BANK, N.A., AND WACHOVIA MORTGAGE CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR ADMINISTRATIVE LAW PROFESSORS RICHARD J. PIERCE, JR., FRANK B. CROSS, AND MARK B. SEIDENFELD AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICI CURIAE*

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Richard J. Pierce, Jr., is the Lyle T. Alverson Professor of Law at the George Washington University Law School. He teaches administrative law, antitrust law, and evidence. Professor Pierce is the author of many publications on administrative law issues, including the leading multi-volume treatise on administrative law. *See* Richard J. Pierce, Jr., *Administrative Law Treatise* (4th ed. 2002). This Court has cited the *Administrative Law Treatise* on numerous occasions. *See, e.g.*, *Woodford v. Ngo*, 126 S. Ct. 2378, 2386 (2006); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002); *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997). Professor Pierce is also a co-author of an administrative law textbook. *See* Richard J. Pierce, Jr. et al., *Administrative Law and Process* (4th ed. 2004).

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[1] Both parties have consented to the submission of this brief in letters filed with the Clerk. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or part. None of the *amici* submitting this brief has any financial interest in this matter and none has been compensated for their participation in the drafting of this brief. O'Melveny & Myers LLP, which serves as counsel for the *amici*, is appearing in cases in other courts raising banking preemption issues and is compensated by Bank of America for its work in those cases as well as for its assistance to the *amici* in the preparation of this brief. No other person or entity has made any financial contribution to the preparation or submission of this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Professors Pierce, Cross, and Seidenfeld have filed this brief to address a basic question of administrative law raised by petitioner and her *amici* in this case, *viz.*, the extent to which a court should defer to an administrative regulation that preempts state law. As demonstrated in this brief, that question has already been clearly – and correctly – answered by this Court in an unbroken line of precedents dating back almost 50 years. Those precedents hold that when a federal agency, exercising regulatory power within the scope of the policymaking authority conferred on the agency by statute, promulgates a regulation that by its terms or operation displaces state law, that regulation is entitled to the same broad deference that would be accorded to any other regulation within the agency's statutory authority. The rule is settled, sensible, and straightforward: "[E]ven in the area of preemption, if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *New York v. FCC*, 486 U.S. 57, 64

(1988) (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

Although that rule has been accepted and utterly non-controversial for decades, the Court has been urged in this case to discard the rule outright. The proposed alternative would force courts to treat agency regulations differently when they might have the effect of preempting state laws. Under this novel approach, developed most fully in a brief filed by Professor Thomas Merrill on behalf of the Center for State Enforcement of Antitrust and Consumer Protection Law ("State Center"), an agency regulation preempting state law can be upheld only if the court decides for itself that preemption is "required" to effectuate the statute's policy objectives. SC Br. 27.

This approach is not only contrary to precedent, but it is contrary to precedent precisely because it is an illogical framework for judicial review of federal agency regulations. This Court's general agency deference cases recognize that when Congress confers broad rulemaking authority on an agency, Congress intends to give the agency wide latitude in deciding what policies are appropriate for effectuating the statute's general objectives. That general rule of deference was not devised from wholecloth – rather, it was explicitly drawn from cases holding that agency judgments *about preemption* are *policy* judgments to which courts must defer. It makes no sense now to suggest that the rule of broad deference should exclude the very category of policy judgments on which the rule is based.

The court below thus applied the proper standard in upholding the agency preemption regulations at issue in this case. As the opinion explains, the regulations do not exceed the agency's authority and are not manifestly contrary to the statute. That should end the analysis.

ARGUMENT

I. THIS COURT'S PRECEDENTS REQUIRE FULL DEFERENCE TO AGENCY POLICY JUDGMENTS "EVEN IN THE AREA OF PREEMPTION"

This Court's precedents on judicial deference to agency regulations preempting state law are neither ambiguous nor inconsistent. As early as *United States v. Shimer*, 367 U.S. 374 (1961), the Court made clear that an agency determination that state laws should give way before the federal scheme is a basic policy determination entitled to the same broad judicial deference accorded other agency policy determinations. Subsequent decisions have reinforced that rule without exception. *See* 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 158 (4th ed. 2002) (noting the settled rule that "a federal agency can preempt a state statute, rule, or common law doctrine" and that "*Chevron* deference is due a legislative rule or adjudication in which an agency purports to preempt a state law").

A. Pre-*Chevron* Cases Established A Rule Of Broad Deference To Agency Policy Judgments, Including Judgments About The Need For Preemption

Twenty-five years before the Court issued its decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court in *Shimer* established that courts must accord the broadest possible deference to agency policy judgments, even when those policy judgments involve the need for preemption of state laws. In *Shimer*, the Court upheld Veterans Administration ("V.A.") loan regulations clearly intended to "displace state law" (367 U.S. at 377), promulgated pursuant to the agency's general authority to prescribe rules and regulations governing V.A. loan guarantees. *Id.* at 381 n.9. Before analyzing preemption specifically, the Court invoked the basic, long-standing principle of deference to agency policy determinations:

> More than a half-century ago this Court declared that "where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts unless he has exceeded his authority or this court should be of [the] opinion that his action was clearly wrong."

Id. at 381-82 (quoting *Bates & Guild Co. v. Payne*, 194 U.S. 106, 108-09 (1904)). The Court then applied that basic rule directly to the V.A.'s decision to preempt certain state loan guarantee laws. Significantly, the Court noted that the V.A.'s choice to preempt was not *required* by the statute it was enforcing. *See id.* at 382 ("It would, of course, have been possible for the Administrator to have promulgated regulations consistent with much of the present scheme which would have, in addition, accepted the benefits of local law . . . ."). But, the Court emphasized, the choice whether to "take advantage of [state] laws" or to displace them was a policy choice for the agency to make, not the courts: "If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 383. Because the V.A. regulations at issue in the case were "a reasonable accommodation of the statutory ends," the Court upheld them. *Id.* at 385.

The Court reinforced *Shimer*'s rule of broad deference to preemptive agency regulations in *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982) – a case very similar in posture to the case currently before the Court. Like this case, *de la Cuesta* involved a regulation promulgated by a federal banking agency that expressly preempted state laws governing the exercise of certain federally con-

ferred banking powers. *Id.* at 146-47. Relying on *Shimer*, the Court explicitly equated the standard of deference applicable to preemption regulations with the standard applicable to all regulations. In general, the Court observed, "[w]here Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he exceeded his statutory authority or acted arbitrarily." *Id.* at 154 (citing *Shimer*, 367 U.S. at 381-82). And when "the administrator promulgates regulations intended to pre-empt state law," the Court concluded, "the court's inquiry is similarly limited," 458 U.S. at 154, quoting the key passage in *Shimer* mandating deference to a preemption judgment that reflects a reasonable accommodation of conflicting policies within the agency's general authority.

The *de la Cuesta* Court also reiterated the important point that an agency may choose to preempt state law even where preemption is not required to fulfill the statute's objectives. *See id.* ("whether the administrator failed to exercise an option to promulgate regulations which did not disturb state law is not dispositive"). Further, the Court noted, a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Id.* Thus in the context of *regulatory* preemption, a "narrow focus on *Congress'* intent to supersede state law" is "misdirected." *Id.* (emphasis added). What matters is whether the *agency* "meant to pre-empt [state] law, and, if so, whether that action is within the scope of the [agency's] delegated authority." *Id.* Applying that deferential standard, the Court upheld the agency's preemption regulation, because although "the wisdom of the Board's policy decision [wa]s not uncontroverted . . . neither [wa]s it arbitrary or capricious." *Id.* at 169.

The Court applied the same rule yet again in its unanimous decision in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). Pursuant to a general statutory mandate to establish nationwide telecommunications service, the FCC

promulgated a preemption regulation reflecting its expert policy judgment that "only federal pre-emption of state and local regulation [could] assure cable systems the breathing space necessary" to expand and provide program diverse services. *Id.* at 708. Invoking the broad deference standard of *Shimer* and *de la Cuesta*, the Court enforced the regulation: "While that judgment may not enjoy universal support, it plainly represents a reasonable accommodation of the competing policies committed to the FCC's care, and we see no reason to disturb the agency's judgment." *Id.*

B. *Chevron* Is Based On The Pre-existing Rule Of Judicial Respect For Agency Policy Judgments, Including Judgments About Preemption

Although often regarded as a pathbreaking decision, the Court's decision in *Chevron* was in important respects simply an application of the firmly settled and non-controversial principle that courts must defer to agency policy judgments within the scope of their authority. As the *Chevron* Court explained, sometimes Congress "explicitly" leaves a "gap" in a statutory structure and thus "expressly" delegates to the agency the authority to decide what policy choices best effectuate the statute's objectives. 467 U.S. at 843-44. In such situations, of course, the Court had long recognized that courts must uphold agency policy choices unless arbitrary or capricious or manifestly contrary to the statute. *See id.* at 844 n.12 (citing cases). What *Chevron* arguably added to the law was the idea that when there is no explicit statutory gap, but there is a particular statutory *term* that is ambiguous, Congress "implicit[ly]" delegated to the agency the same authority to decide through regulation which construction of the term best advances the statute's policy objectives. *See id.* at 844.[2] In both situations, the Court explained, the pre-

[2] The Court later made clear that such a delegation can be presumed only when Congress gives an agency the power to act with the force of law. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

existing rule of broad deference to the agency's policy choice applies. *Id.*

It is notable that in this final step of the analysis, the *Chevron* Court specifically quoted *Shimer* and cited *Crisp* for its articulation of the proper deference standard. As the *Chevron* Court itself described that standard:

> ". . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961). Accord, *Capital Cities Cable, Inc.* v. *Crisp, ante*, at 699-700.

Id. at 845. In other words, what soon became known as "*Chevron* deference" is a standard specifically drawn from *cases involving deference to agency policy judgments about preemption.* It would be ironic indeed to hold that the one area of agency policy decisionmaking to which *Chevron* does *not* apply is the very area that gave birth to the doctrine in the first place.

C. Post-*Chevron* Cases Confirm The Continuing Vitality Of The Rule Requiring Broad Deference To Agency Policy Judgments About Preemption

Cases decided after *Chevron* demonstrate that *Chevron* did not, in the course of drawing its deference standard from agency preemption precedents, somehow dilute those precedents *sub silentio*.

Two years after *Chevron*, the Court relied on *Crisp*, *de la Cuesta*, and *Shimer* to uphold FCC regulations preempting state laws regulating technical signal quality standards for cable television. *See New York v. FCC*, 486 U.S. 57 (1988). The Court reiterated that when preemption by an *agency* is involved, "the inquiry becomes whether the federal agency

has properly exercised its own delegated authority rather than simply whether *Congress* has properly exercised the legislative power." *Id.* at 64 (emphasis added). Because a "'pre-emptive regulation's force does not depend on express congressional authorization to displace state law,'" a "'narrow focus on Congress' intent to supersede state law [is] misdirected.'" *Id.* (quoting *de la Cuesta*, 458 U.S. at 154) (alteration in original). "Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action." *Id.* The Court further emphasized that when agency is given a "broad grant of authority to reconcile conflicting policies," that authority presumptively includes the power to reconcile policies "*even in the area of preemption*," and thus courts must defer so long as the agency's decision is reasonable and not manifestly contrary to Congress's intent. *Id.* (quoting *Shimer* deference standard) (emphasis added). Finding no indications in the text or history of the 1984 Cable Act that Congress affirmatively intended to deny the FCC the power to preempt state law, the Court upheld the agency's preemption regulation. *Id.* at 69 ("[W]e find nothing in the Cable Act which leads us to believe that the Commission's decision to pre-empt . . . 'is not one that Congress would have sanctioned.'" (quoting *Shimer*, 367 U.S. at 383)).

The Court again applied the *Shimer-Chevron* standard of broad deference to an agency's preemption judgment in *New York v. FERC*, 535 U.S. 1 (2002). In *FERC*, a State challenged FERC's assertion of exclusive jurisdiction to regulate certain transmissions and sales of electrical energy. In particular, the State complained that the federal circuit court reviewing the FERC order had failed to apply a "presumption against federal pre-emption" to the order. *Id.* at 17. The Court squarely rejected the State's position, explaining that review of an agency's preemption judgment "does not involve a 'presumption against pre-emption.'" *Id.* at 18. In that situation, the Court noted, the principal question is sim-

ply whether the agency's action is within the scope of the agency's delegated authority (paraphrasing the *Shimer-Chevron* standard). *Id.* To answer that question, a court must "determine whether Congress has given [the agency] the power to act as it has," but it must make that inquiry "without any presumption one way or the other." *Id.* at 18. Because the statute in that case gave FERC the power to regulate the transmission and sale of electric energy, the Court held that the statute necessarily gave FERC the power to preempt certain state laws on the subject. *Id.* at 19-20.

D. Cases Finding *No* Preemption Also Confirm The *Shimer-Chevron* Standard

The precedents of this Court finding that particular agency regulations did *not* preempt confirm the basic deferential standard of *Shimer* and progeny, while effectively illustrating both its breadth and its limits.

Three instructive cases are *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); and *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) ("*Louisiana PSC*"). In *Hillsborough*, the Court held that FDA regulations governing the handling of blood plasma did not preempt a local ordinance imposing additional controls on blood plasma donation. The regulations did not preempt, the Court explained, principally because the FDA had stated in a preamble to the regulations that it did not intend the regulations to be exclusive. 471 U.S. at 714-15. Given the explicit agency statement of its intent *not* to preempt, the Court held that a presumption against preemption applied, and thus the Court would not read the regulations as preempting state law unless the regulations themselves compelled that reading. *Id.* at 715.

The Court's explanation of why the regulations did not compel an inference of preemption from their mere "comprehensiveness" is significant. As the Court explained, it is

generally "more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes" because "agencies normally deal with problems in far more detail than does Congress," and can "speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments." *Id.* at 717-18. Accordingly, "we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." *Id.* at 718.

Where an agency *does* make its preemptive intentions clear, by contrast, *Hillsborough* confirms that courts must accord wide deference to that judgment. In explaining why the agency's decision *not* to preempt was not inconsistent with the statute, the Court emphasized the breadth and importance of the agency's power to make preemption judgments on policy issues within the agency's authority. "[T]he FDA possesses the authority to promulgate regulations preempting local legislation," the Court explained, "and can do so with relative ease." *Id.* at 721. The agency's power to preempt local law when the agency deems appropriate is crucial, because "the agency can be expected to monitor, on a continuing basis, the effects on the federal program of local requirements," whereas "Congress . . . normally does not follow, years after the enactment of federal legislation, the effects of external factors on the goals that the federal legislation sought to promote." *Id.* In other words, the Court effectively deferred to the agency's judgment that preemption was not required to fulfill the statute's objectives, because the Court understood that the agency had not only broad authority to preempt if it deemed necessary, but also critical expertise as to the policy need for preemption, born of its continuing experience with the interplay between local law and federal statutory objectives.

Medtronic is another case finding no preemption but illuminating the relevant principles. In that case, the majority

opinion for the Court held that the *statute itself* did not preempt certain state-law claims, where the FDA regulations also took the view that the statute did not preempt the claims. *See* 518 U.S. at 496-97 & n.16. As Justice Breyer's concurring opinion elaborated more fully, the FDA's broad enforcement responsibility under the statute gave it ample authority to decide whether preemption of state law was necessary to accomplish the statute's objectives. *Id.* at 506. "That responsibility means informed agency involvement and, therefore, special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives." *Id.* Thus, "in the absence of a clear congressional command as to pre-emption, courts may infer that the relevant administrative agency possesses a degree of leeway to determine which rules, regulations, or other administrative actions will have pre-emptive effect." *Id.* at 505. Because the FDA had explicitly chosen *not* to preempt state law, preemption was not appropriate, but if the agency made a different policy choice within the "degree of leeway" afforded by its statutory authority, deference would be proper under Justice Breyer's analysis. *Id.*

Hillsborough and *Medtronic* find no preemption but effectively illustrate the wide breadth of an agency's basic authority to preempt through regulation. *Louisiana PSC* is a case finding non-preemption that exemplifies the limits of that authority. *Louisiana PSC* involved an FCC regulation preempting certain state laws governing intrastate telephone communications. Far from questioning the basic rule of deference to such regulations, the *Louisiana PSC* Court repeatedly endorsed the *Shimer* rule that a federal agency may promulgate regulations preempting state law "when and if it is acting within the scope of its congressionally delegated authority." 476 U.S. at 374; *see id.* at 369 (citing *Crisp* and *de la Cuesta*). The Court simply held, however, that the FCC's preemption determination exceeded its authority un-

der the statute, which explicitly denied the FCC the authority to regulate intrastate service. *Id.* at 369-70. As the Court explained, "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign state, unless and until Congress confers power upon it." *Id.* at 374. Because Congress specifically denied the agency the power to regulate intrastate service, its preemption judgment could not stand, even if the agency thought it would best advance the statute's policies. *See id.*

Louisiana PSC simply underscores the complete identity between the *Shimer* standard of deference applicable to agency policy judgments about preemption and the *Chevron* standard of deference applicable to all other agency policy judgments. A court does not defer under *Chevron* to an agency's judgment that exceeds the scope of its authority under the statute or is plainly contrary to the terms of the statute. *See Chevron*, 467 U.S. at 844; *see also Oregon v. Gonzales*, 126 S. Ct. 904, 918-21 (2006) (Attorney General regulation exceeds scope of delegated authority); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133-42 (2000) (FDA regulation precluded by text and structure of statute). Likewise, *Louisiana PSC* confirms that courts do not defer under *Shimer* to a preemption judgment the agency is plainly not empowered to make.

By contrast, the opposite result must obtain where the agency is given otherwise broad regulatory authority, and there is no affirmative indication in the text or history of the statute that Congress did not to confer on the agency the power to preempt state law. If the agency in that situation determines that preemption is needed to effectuate the statute's objectives, courts must respect and enforce that judgment, as cases from *Shimer* to *de la Cuesta* through *Chevron* to *FERC* have consistently made clear.

II. THE STATE CENTER BRIEF PROVIDES NO SOUND BASIS FOR DISCARDING THE *SHIMER-CHEVRON* FRAMEWORK FOR REVIEW OF AGENCY PREEMPTION JUDGMENTS

Professor Merrill's brief for the State Center in this case urges the Court to adopt a framework for analyzing agency preemption regulations that is radically at odds with the precedents described above and with the sound logic underlying them. Rather than defer to an agency's policy judgment that preemption is needed to effectuate federal objectives within the agency's domain, the brief's novel approach would shift ultimate responsibility for all policy judgments potentially affecting state laws to the courts. SC Br. 19-20. The State Center brief contends that a court should "respectfully" consider an agency judgment – reflected in a duly promulgated regulation with the force of law – that certain state laws must be displaced (*id.* at 2), but that the court itself must ultimately decide whether preemption is actually "required" to effectuate the statute's policy objectives. *Id. at* 3, 6, 14, 27. Accordingly, if the court decides that preemption is not "required," the court would invalidate the preemptive regulation.

As the previous section explained, the approach proposed by Professor Merrill on behalf of the State Center is demonstrably contrary to this Court's precedents. In this section, we show that the approach has no logical basis either, as demonstrated by the weakness of the arguments marshaled in support of the theory. We begin, however, by pointing out a fundamental error infecting the entire approach developed in the State Center brief.

A. Agency Judgments About Preemption Are Fundamentally Policy Decisions Within Agencies' Domain, Not Purely Legal Interpretive Questions

The theory of State Center brief starts from the basic premise that "[p]reemption is often characterized as an exer-

cise in statutory interpretation, or as resting entirely on congressional intent." *Id.* at 6. The brief then asserts that finding such statutory or interpretive preemption "requires answering two interrelated questions":

> First, there is the question of interpretation: What does the federal statute or regulation at issue mean? Second, there is the question of displacement: Is federal law, as interpreted, in tension with state law, and is this tension sufficiently severe to require displacement of state law in whole or in part in order to achieve the purposes of federal law?

Id. at 6. The State Center brief argues that Congress itself ideally would answer the latter "displacement" question for every potential situation in the plain text of the statute, but the brief also recognizes that "[g]iven the limits of human knowledge, Congress cannot be expected to resolve all preemption questions through express preemption and savings clauses." *Id.* at 7. As the brief quite effectively explains:

> Congress is severely hampered in resolving preemption controversies by the fact that legislation ordinarily operates prospectively. The limits of human knowledge make it virtually impossible for Congress to anticipate all relevant issues before they arise. Congress would have to analyze the common law and statutory rules of fifty different States, including not just those in existence at the time the federal legislation was enacted, but those that might be passed in the future. . . . This is clearly beyond the capacity of even the most far-sighted legislative body.

Id. Recognizing that some "institution" other than Congress must be responsible for addressing preemption issues arising in the course of administering and enforcing the statute, the State Center brief posits agencies and courts as the potential alternatives. *Id.* at 7-8. It concludes that courts should be the arbiters of all preemption issues that might arise, and in-

deed of all interpretive issues of *any* kind that could potentially lead to preemption. *Id.* at 8, 19-20.

The theory of the State Center brief, in short, rests entirely on the premise that judicial review of an agency preemption regulation requires discerning whether *Congress itself* intended the *statute* to preempt state law in the situation addressed by the agency regulation. But this framing of the issue ignores the brief's own important insight: Congress *cannot*, and therefore often *does not*, decide in advance whether, when, and to what extent a given federal statutory scheme should displace state law. Indeed, as this Court's cases have repeatedly observed, *see supra* at 4-10, Congress may well have no particular intent one way or the other with respect to the preemption of specific state laws within the statute's compass.

In enacting a federal statute, however, Congress at least has spoken implicitly to the possibility of preemption, because by establishing federal law in the area and authorizing an agency to administer and enforce the details of federal regulatory goals, Congress necessarily has determined that state law on the subject is *not* sufficient and that there is a need for federal response. In that situation, what Congress expects – unless it affirmatively indicates otherwise – is that the agency will "monitor, on a continuing basis, the effects on the federal program of local requirements." *Hillsborough*, 471 U.S. at 721; *accord Medtronic*, 518 U.S. at 506 (Breyer, J., concurring) ("That [continuing enforcement] responsibility means informed agency involvement and, therefore, special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives."). And what Congress also expects is that when the agency identifies potentially "conflicting policies," it will make whatever "accommodation" the agency decides is appropriate, based on its experience

and judgment, including the extent to which state law should give way to federal regulatory objectives. *Shimer*, 367 U.S. at 383.

Accordingly, as this Court has repeatedly and correctly held, the correct focus in review of an agency preemption regulation is not the intent of *Congress*, as the State Center brief asserts, but of the *agency* itself. The intent of Congress matters, but only as to whether Congress affirmatively intended to deny the agency the power to issue regulations that preempt state laws within the agency's regulatory domain. *See supra* at 5-13. Absent affirmative indications in the text or history that the agency lacks the power to preempt, courts must assume that Congress intended agencies to resolve the policy issues that inevitably arise in the form of potential conflicts between state laws and the federal objectives the agency is to enforce and promote. Resolution of those policy issues, of course, typically requires close familiarity with, *inter alia*, the varying details of potentially fifty different state schemes; the nature, frequency, and breadth of their application; the state of empirical knowledge on the subject being regulated; experience with different types of regulatory schemes; and the philosophical approach to regulation preferred by the Executive in office. *See infra* at 28-29 (noting policy bases for preemption regulations at issue in this case). Given the non-judicial, quintessentially *policy* nature of such questions, it is no surprise that this Court has so long and so firmly established that "even in the area of preemption" agencies must be given wide latitude in deciding what policy accommodations are appropriate under the particular factual and legal circumstances involved. *New York v. FCC*, 486 U.S. at 64.[3] Nor is it a surprise that in applying this *Shimer*-

[3] The State Center brief accurately explains why agencies are generally better positioned to make the policy judgments that arise during administration of a federal scheme: "Agencies charged with the administration of statutes often have a better understanding of the nuances of a regulatory regime than do courts. And insofar as the resolution of ambi-

Chevron standard of broad deference, the Court has made clear that agencies may choose to preempt as a matter of policy even when preemption is not strictly "required" by the statute, as Professor Merrill's theory would demand. *See supra* at 4-7 (noting that *Shimer*, *de la Cuesta*, and *Crisp* all upheld preemption regulations even while observing that agency was not required to preempt).

The State Center brief, in short, misconstrues the nature of much agency preemption regulation, which is not strictly "statutory" or "interpretive" in the sense the brief posits, but is instead a policy *choice* of the kind agencies are *expected* to make (again, absent contrary statutory indications). As we will show below, most of the brief's analysis founders on this misconception. To be clear, however, the analysis is equally wrong when applied to agency preemption regulations that purport to "interpret" ambiguous statutory terms related to preemption. As shown above, *supra* at 7-8, the *Chevron* standard of deference applicable to an agency's statutory interpretation is functionally identical to, and indeed drawn directly from, the *Shimer* standard of deference applicable to an agency policy regulation. For the same reason that a court accords full deference under *Chevron* to any statutory interpretation by an agency, a court must accord full deference to a preemption interpretation: the presumption in both instances is that by leaving a statutory term imprecise, Congress implicitly intended to leave that definitional gap for the agency to fill based on *its* assessment of which construction would best advance the statute's *policies*. And as just discussed, a decision to preempt is no less a pol-

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guities in statutes and regulations entails making policy judgments, agencies are more accountable policymakers than courts." SC Br. 2; *see also id.* at 8 (noting that "agencies have intimate familiarity" with making "judgment[s] about the requirements of individual federal regulatory schemes"). As explained in the text, the brief simply errs in failing to appreciate why preemption judgments entail the same type of policy determinations.

icy decision than any other regulatory judgment, and indeed may be a policy determination of significantly greater consequence than others to the fulfillment of the statute's objectives. It makes no sense to accord broad deference to agency policy regulations preempting state law, but *not* to accord such deference when an agency makes the exact same policy determination in the context of construing a statutory provision relating to preemption. In either situation, so long as the agency's judgment is within its statutory authority and not contrary to the statute, the agency's policy judgment should control.

B. The State Center Brief's Specific Objections To Applying *Shimer-Chevron* Deference To Agency Preemption Regulations Are Meritless

The State Center brief suggests four specific reasons a court should not accord full deference to an agency's preemption regulation. None has merit.

1. *The Fact That Preemption Regulations Implicate The Supremacy Clause Is Irrelevant*

The first reason proposed for discarding *Shimer-Chevron* deference to agency preemption judgments is that preemption presents an issue of constitutional law under the Supremacy Clause, and "the judiciary has a unique competence to resolve questions of constitutional law." SC Br. 8-9. But a preemption determination is not a judgment about *the meaning of the Constitution*. *Cf. Pub. Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1998) ("The federal Judiciary does not . . . owe deference to the Executive Branch's interpretation of the Constitution."), *quoted in* SC Br. 9. It is, rather, a quintessentially *policy* determination about whether a federal regulatory scheme will operate more effectively in the absence of supplementary or potentially conflicting state regulation. And once that policy decision is made and manifested in a statute or regulation, the targeted state laws be-

come invalid simply as a consequence of the Constitution's *operation*, not its *interpretation*.

This point can be seen clearly in the operation of a preemption power that even the State Center brief agrees is inherent in all agencies: the power to preempt state laws by promulgating regulations that either mandate conduct prohibited by state law or prohibit conduct required by state law. SC Br. 5. Because compliance with state law in that situation is literally impossible, such a regulation preempts the conflicting state laws by its necessary operation. Such a regulation by definition reflects an agency's judgment that the federal regulation should be exclusive of state laws, which constitute unsound policy that should not be enforced. Yet nobody contends that the promulgation and review of such legislative regulations implicates "constitutional" questions – if the regulation is otherwise valid (i.e., within the agency's authority and not contrary to the statute), the contrary state laws simply give way as a matter of course under the Supremacy Clause. The situation is no different when an agency establishes supreme federal law not simply by defining its substance, but by expressly declaring through legislative regulation which state laws represent unsound policy in conflict with federal law. In both circumstances the agency is making a policy judgment, not interpreting a constitutional provision.

2. *Agency Preemption Decisions Are Based Primarily On Policy Judgments, Not On Abstract Application Of Judicially Developed Doctrine*

The next argument advanced in the State Center brief is that agency preemption determinations require the application of legal doctrines developed by courts and thus better applied by them. SC Br. 9-11. But when an agency decides that preemption is warranted, it does not simply apply this Court's preemption precedents and decide, as a court would, what the "correct" legal result should be. As already dis-

cussed, agencies typically make a policy *choice*, one the agency deems appropriate given an evident or potential policy conflict, but not necessarily compelled under existing doctrines. This Court's preemption doctrines are only the starting point for the agency, in other words, they are not themselves solely dispositive.[4] To say that agencies must be denied deference because courts are better at acting like courts is to miss the point of *Shimer* deference entirely: *courts cannot act with policy discretion*, which is critical in deciding whether, when, and to what extent state laws are interfering with, or could interfere with, federal objectives.

3. *The Truism That Preemption Involves Federalism Does Not Undermine* Shimer-Chevron *Deference*

The State Center brief's third argument is that courts should assess the need for preemption independently because federal agencies are not sufficiently accountable to the states for their own preemption decisions. SC Br. 11-12. This is little more than an attack on *Chevron* itself. As the Court recognized in *Chevron*, there are a variety of political constraints on executive agency action:

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[4] In the Preamble to one of preemptive regulations involved in this case, the agency noted that it believed the regulation was consistent with the result a court would reach. *See Investment Securities; Bank Activities and Operations; Leasing*, 66 Fed. Reg. 34,784, 34,790 (July 2, 2001). As the agency has explained, that statement did *not* indicate that the agency chose to preempt state law only because it read this Court's cases as *requiring* preemption under the statute. U.S. Pet. Br., *Burke v. Wachovia Bank, N.A.*, No. 05-431, at 9 n.4 ("U.S. *Burke* Br.") Rather, the statement appears in a section of the Preamble explaining why the agency believed its policy choice to preempt raised no concerns under Executive Order No. 13,132, 3 C.F.R. § 206 (2000), which requires agencies to consider the federalism impacts of new regulations. U.S. *Burke* Br. 9 n.4 The agency has explained that the Preamble statement simply expressed the agency's view that its new regulation did not implicate Executive Order No. 13,132 because it was merely clarifying and reinforcing an earlier regulation that already preempted state law under settled preemption doctrine. *Id.*

> [A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices.

467 U.S. at 865. This Court has recognized that when agencies make decisions with the force of law, states – no less than other interested entities – generally "will participate in the process." *United States v. Locke*, 529 U.S. 89, 117 (2000). Notice and comment rulemaking thus serves as a "procedural bridge across the political accountability gap between state and administrative agencies." *Geier v. Am. Honda Motor Corp.*, 529 U.S. 861, 908-09 (2000) (Stevens, J., dissenting); *see id.* at 912. As shown above, this Court's framework for deference to agency preemption decisions prevailed long before *Chevron* itself, and there is no evidence whatsoever that state regulatory authority has been unduly constricted as a consequence. To be sure, various agencies have exercised their authority to preempt various state laws in various ways, but despite almost 50 years of broad judicial deference to those decisions, the State Center brief cites no example of any federal agency becoming the sort of a "runaway engine of preemption" it purports to fear. SC Br. 27.

4. Shimer-Chevron *Deference Permits – Indeed Requires – Courts To Enforce Statutory Limits On Agency Authority*

The final argument in the State Center brief for discarding *Shimer-Chevron* is that preemption determinations are a species of agencies' judgments about their own jurisdiction, to which no deference should attach. SC Br. 12-15. Leaving aside the point that many precedents of this Court have ap-

plied *Chevron* deference "even to an agency's interpretation of its own statutory authority or jurisdiction," *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment) (citing cases), there is no basis for concern on this issue, as the State Center brief itself establishes. To prove its point, the brief relies primarily on *Louisiana PSC*, in which, as discussed above, *supra* at 12-13, this Court held that the FCC exceeded its authority by preempting state laws in the face of a clear statutory limitation on its power to preempt such laws. But *Louisiana PSC* provides no evidence that courts applying *Shimer-Chevron* cannot keep agencies cabined within their statutory boundaries; rather, it proves *exactly the opposite point*: it demonstrates that *Shimer-Chevron* provides a fully sufficient framework for courts to constrain agency preemption of state laws when such preemption is beyond the authority Congress statutorily invested in the agency. *Louisiana PSC* thus illustrates both the clear limits of *Shimer-Chevron* and the enforceability of those limits by courts.[5]

C. The State Center Brief Misreads This Court's Agency Preemption Cases

In an attempt to create room for its novel approach to review of agency preemption determinations – and to obscure the extent of its departure from longstanding precedent – Professor Merrill's brief for the State Center contends that this Court's decisions reflect "a variety of propositions about the role of administrative agencies in determining questions of preemption." SC Br. 21. They do not – the Court's cases consistently reflect the rule set forth almost 50 years ago in *Shimer*. In arguing otherwise, the State Center brief misreads virtually every case it cites.

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[5] Other cases Professor Merrill cites in this discussion also contradict his point in the same way. *See Brown & Williamson*, 529 U.S. at 159 (agency exceeded authority); *Gonzales*, 126 S. Ct. at 916-22 (same).

After correctly citing *New York v. FCC* as a case requiring "strong deference to agencies' views about pre-emption," the State Center brief cites *Louisiana PSC* as a case "suggest[ing] the question should be decided *de novo*" by courts. SC Br. 21. But as just explained, *Louisiana PSC* held that the FCC regulation was invalid because the statute explicitly prohibited the regulation – exactly the manner in which *Shimer* and *Chevron* both work. The brief also points to *Geier v. American Honda Motor Co.*, 529 U.S. at 881, as "contemplat[ing] an intermediate degree of deference," SC Br. 21, but *Geier* did *not* involve an expressly preemptive regulation, and thus the Court necessarily was called upon to determine for itself the preemptive scope of the agency's regulations, with the agency's views stated only in an *amicus* brief. 529 U.S. at 883. Even then, the majority gave the agency's views substantive weight in its analysis, not just the "respectful consideration" proposed in the State Center brief. *See id.* at 883-86. And the dissenters in *Geier* made clear that they would have deferred fully to an expressly preemptive regulation if the agency had promulgated one through formal notice-and-comment procedures. *See id.* at 908-10, 912 (Stevens, J., dissenting).[6]

The State Center brief also asserts that *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), "unequivocally reserved, without deciding, the question presented in this case." SC Br. 22. Not so. First of all, it bears emphasis that in the passage on which the brief relies, the *Smiley* Court squarely *rejected* the argument that *Chevron* deference does not apply to an agency's substantive interpretation of a statute that could *result* in preemption through operation of a statutory express preemption provision (*see* 517 U.S. at 743-

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[6] Professor Merrill misreads *Medtronic* essentially the same way he misreads *Geier*. SC Br. 24-25. Like *Geier*, *Medtronic* did not involve an express preemptive regulation, and the opinions in that case made clear that if it had, the Court would have accorded the regulation full deference. *See supra* at 11-12.

44) – precisely the argument advanced in the State Center brief. SC Br. 19-20. "This argument," the Court explained, "confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive." 517 U.S. at 744. As to the former question, the Court held that *Chevron* plainly applies, despite its consequences for preemption. *Id.* at 744-45. Because *Chevron* applied to the agency's interpretation of the *substantive* provision, which was dispositive of the matter, the Court simply noted that it could "assume (without deciding) that the latter question [the statute's 'pre-emptive meaning'] must always be decided *de novo* by the courts." *Id.* at 744. That comment can hardly be taken as a strong indication that the question was truly an open one; rather, the Court simply indicated that the question was *so irrelevant to the issue at hand* that no matter what answer one assumed, the agency would still deserve deference on the regulation at issue. Perhaps more important, the question ostensibly reserved in *Smiley* is *not* the question raised by the agency regulations at issue here. If those regulations are valid under the agency's broad grant to statutory enforcement authority, the question of the statute's *own* "pre-emptive meaning" simply does not arise.[7]

Finally, the State Center brief misreads essentially the entire line of *Shimer* deference cases from *de la Cuesta* forward. Notably, the brief ignores *Shimer*'s discussion of the standard, treating the rule as if it suddenly sprung to life in mature form in *de la Cuesta*. But even leaving aside *Shimer* itself, the reading of *Shimer*'s progeny advanced in the State Center brief cannot be reconciled with either the language or the holdings of those cases. The brief contends that *de la Cuesta* correctly held that to uphold an agency's preemptive

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[7] If the hypothetical question raised in *Smiley* were both open and relevant here, we submit that the answer can be found in *Chevron* itself, as explained above, *supra* at 7-8.

regulation, a court must find "[1] agency intent to preempt and [2] agency action within the scope of its delegated authority." SC Br. 27. The brief contends that *de la Cuesta*'s reasoning went awry, however, in suggesting that these two criteria are the only criteria that must be satisfied. The brief contends that a "third requirement" should have been recited: "whether displacement of state law is required under traditional preemption doctrine." *Id.* It contends that *de la Cuesta*, *Crisp*, and *New York v. FCC* all wrongly omitted this requirement, but, the brief asserts, none of them would need to be "overruled" under its theory because they all reached the right result under traditional preemption doctrine. *Id.* at 28. Again, not so.

In each of these cases the Court *specifically* noted that the agency's decision to preempt was *not* required, *see supra* at 5-7, 8-9; the preemption decision in each case was nevertheless permissible only because, as the Court explained, under the *Shimer-Chevron* deference standard, the agency has the policy discretion to *choose* whether to preempt state laws within the sphere of its authority unless Congress clearly says otherwise. Absent the agency's regulatory choice to preempt in those cases, in other words, the statute itself would not have provided a basis for finding that preemption was "required," as the standard proposed in the State Center brief would demand.

There is, in sum, no room in either logic or precedent for the theory Professor Merrill has developed in the State Center brief. This Court would be forced to overhaul nearly 50 years of its own precedents, not to mention the countless lower court precedents and agency decisions that have been made in reliance on agency authority to preempt state laws as needed in the agency's judgment to advance federal regulatory schemes. And all of that simply to force courts into an ill-suited role as substantive policymakers, deciding for themselves whether, when, how, and to what extent federal

policy objectives should supersede state laws. Such policymaking should remain the business of the policymaking branches – Congress and those in the Executive Branch to whom Congress delegates policymaking authority.

III. THE LOWER COURT'S DECISION ILLUSTRATES THE PROPER OPERATION OF *SHIMER-CHEVRON* DEFERENCE

For all the foregoing reasons, the Sixth Circuit did not apply an erroneous standard of review to the Office of the Comptroller of Currency ("OCC") regulations at issue here, as the State Center brief asserts. SC Br. 28. The court specifically invoked the *Shimer-Chevron* standard as articulated by this Court in *de la Cuesta*: A "'pre-emptive regulation's force does not depend on express congressional authorization to displace state law,'" the court noted, and because the agency here explicitly intended to preempt state law, the "only question" remaining is "whether the Comptroller 'has exceeded [its] statutory authority or acted arbitrarily.'" Pet. App. 7a (quoting *de la Cuesta*, 458 U.S. at 154); *see id.* ("We . . . focus on whether the Comptroller has exceeded its authority or acted arbitrarily. We do so through the framework established by *Chevron* . . . .").

The court's opinion further reveals a straightforward application of the *Shimer-Chevron* rule. First, as the opinion explains, the preemption regulations at issue here are well within the sphere of the OCC's broad regulatory authority under the National Bank Act ("NBA"). The NBA confers on national banks both enumerated powers and all "incidental powers . . . necessary to carry on the business of banking," 12 U.S.C. § 24 (Seventh), which includes all powers "convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972). The NBA in turn empowers the OCC to issue "rules and regulations" enforc-

ing the NBA, 12 U.S.C. § 93a, through which the OCC exercises "primary responsibility for surveillance of 'the business of banking'" under the NBA. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995). This Court accords full *Chevron* deference to OCC regulations interpreting and enforcing the NBA's "business of banking" provisions. *See Smiley*, 517 U.S. at 738.

Although the NBA itself does not expressly authorize national banks to conduct business through operating subsidiaries, the OCC, pursuant to its broad authority to regulate "the business of banking," determined that national banks could operate more efficiently and effectively if they could conduct certain aspects of the business of banking through operating subsidiaries.[8] Accordingly, the OCC promulgated a regulation authorizing the use of operating subsidiaries: "A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking." 12 C.F.R. § 5.34(e)(1).

The OCC also concluded that operating subsidiaries should be subject to the same laws as the national banks themselves. Because operating subsidiaries are limited to banking activities that the parent national banks themselves could engage in, and they "often have been described as the equivalent of departments or divisions of their parent banks,"

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[8] According to the OCC, operating subsidiaries allow the parent national bank to "control[] operations costs, improv[e] effectiveness of supervision, [provide for] more accurate determination of profits, decentraliz[e] management decisions [and] separat[e] particular operations of the bank from other operations." *Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation*, 31 Fed. Reg. 11,459, 11,460 (Aug. 31, 1966). Operating subsidiaries thus "enhance the safety and soundness of conducting new activities . . . and allow[] more focused management and monitoring of [the bank's] operations." *Rules, Policies, and Procedures for Corporate Activities*, 61 Fed. Reg. 60,342, 60,354 (Nov. 27, 1996).

the OCC determined that they should operate under the same conditions that would apply to the national bank if it engaged in the same business directly. *Investment Securities; Bank Activities and Operations; Leasing*, 66 Fed. Reg. at 34,788. Thus, in the regulation that authorized the creation of operating subsidiaries, the OCC provided that operating subsidiaries would conduct their activities "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. § 5.34(e)(3). And in a later-promulgated regulation explicitly designed to clarify the agency's preemptive intent with respect to state laws regulating operating subsidiaries, the OCC further provided that, "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R. § 7.4006.

As the court below held, those regulations on their face are both reasonable and well within the OCC's general authority to regulate the manner and means by which national banks carry on the "business of banking." Nobody questions that a national bank *itself* may conduct the banking activity at issue here free from state regulation. *See* 12 U.S.C. § 484 (prohibiting states from exercising visitorial powers over national banks). The OCC regulations do nothing more than provide that national banks may conduct that same banking activity through an operating subsidiary equally free from state regulation. *See* Pet. App. 8a-9a. Nothing in the statute precludes that result.

There certainly are no statutory indications that Congress intended to deny the OCC the power to preempt state laws. *Cf. Louisiana PSC*, *supra*. To the contrary, although an affirmative delegation of power to preempt is not necessary under *Shimer* and its progeny, in this case there *is* affirmative evidence that Congress knew the OCC would be exercising the power to preempt. In 12 U.S.C. § 43, Congress required

the OCC to follow formal notice and comment procedures "[b]efore issuing any opinion letter or interpretive rule" concluding that "Federal law preempts the application to a national bank of any State law regarding . . . consumer protection." Such procedures, of course, are already required for the issuance of a formal rule; what § 43 simply adds is that if the OCC seeks to exercise the power to preempt state law through more informal means, *see Hillsborough*, 471 U.S. 717-18 (noting that agency may preempt state law through "regulations, preambles, interpretive statements, and responses to comments"), the agency must employ the procedures normally applicable only to formal rulemaking. It necessarily follows that where, as here, the OCC *does* employ full notice and comment procedures, the agency is acting within authority expressly contemplated by Congress.[9] *See also* 15 U.S.C. §§ 6701(d)(2)(C)(i) & 6714(e) (similarly acknowledging general OCC preemption authority while limiting deference due in insurance context).

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

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[9] The State Center brief tries to dismiss § 43 by noting that it "imposes a *limitation* on any pre-existing agency authority with regard to preemption" by requiring notice-and-comment even for informal preemption statements. SC Br. 18. That is of course true, but in so doing § 43 also unambiguously *confirms* the existence of that pre-existing authority, which the State Center brief does not and cannot deny. Likewise, the statement in the Conference Report that § 43 was "'not intended to confer upon the agency any new authority to preempt'" (SC Br. 18 (quoting H.R. Rep. No. 103-651, at 55, *reprinted in* 1994 U.S.C.C.A.N. 2068, 2076)), is both accurate and irrelevant: § 43 does not create "new authority" to preempt, it limits *and necessarily confirms* pre-existing authority to preempt through formal regulation.

Respectfully submitted,

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No. 05-1342

In the
Supreme Court of the United States

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Financial and Insurance Services,
Petitioner,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF CHARLES W. TURNBAUGH, COMMISSIONER OF FINANCIAL REGULATION FOR THE STATE OF MARYLAND, *et al.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER LINDA A. WATTERS

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INTEREST OF *AMICI CURIAE*

Amicus Charles W. Turnbaugh is the Commissioner of Financial Regulation for the State of Maryland, the state official responsible for supervision and regulation of a wide range of financial services providers doing business within the State of Maryland, including state-chartered banks and nonbank mortgage lenders.[1] *Amicus* American Association of Residential Mortgage Regulators ("AARMR") is an umbrella organization of state officials charged with the administration of state laws regulating residential mortgage lending, servicing, and brokering. AARMR is concerned that its members nationwide will no longer be able to exercise jurisdiction over state-chartered corporations engaged in the mortgage banking business if the decision of the court below and other similar rulings are allowed to stand.

Early in 2004, the Office of the Comptroller of the Currency (the "OCC") announced sweeping preemption of state laws as applied not just to national banks but to their state-chartered operating subsidiaries as well.[2] Since then, *amici* have been faced not only with blatant disregard of state laws by

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[1] Letters of consent by the parties to the submission of this brief have been filed with the Clerk's office. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] These "OCC Regulations" include Office of the Comptroller of the Currency, Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 7, 2004) (codified at 12 C.F.R. pts. 7, 34); Office of the Comptroller of the Currency, Bank Activities and Operations, 69 Fed. Reg. 1895 (Jan. 7, 2004) (codified at 12 C.F.R. § 7.4000).

these state-chartered lenders but also with orchestrated litigation efforts intended to establish judicial approbation of the OCC Regulations and enjoin attempts by state officials to enforce state law. Just as the Sixth Circuit has done in this case, the United States Court of Appeals for the Fourth Circuit recently accorded deference to the OCC Regulations and affirmed the issuance of an injunction frustrating the ability of state officials to investigate consumer complaints or otherwise enforce Maryland's mortgage lending laws with respect to state-chartered operating subsidiaries of a national bank. *National City Bank of Indiana v. Turnbaugh*, ___ F.3d ___, 2006 WL 2294843 (4th Cir., Aug. 10, 2006). That action was commenced by National City Bank after Maryland consumers had filed complaints alleging that its operating subsidiaries had violated state limitations on prepayment penalties in adjustable rate mortgages.

The Fourth Circuit decision, together with the decision of the Sixth Circuit below and others in the Second and Ninth Circuits,[3] are of enormous concern to *amici* because they, like the OCC regulations giving rise to them, vitiate federalism principles that have constituted the bedrock of our systems of financial regulation and corporate governance. Moreover, these developments represent an alarming encroachment upon sovereign state interests, which are protected by the Tenth Amendment to the United States Constitution.[4] Left unchecked, these regulations and court decisions will eradicate well-established legal distinctions between national banks and

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[3] *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), *petition for cert. filed*, No. 05-431 (U.S. Sept. 30, 2005).

[4] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

their subsidiaries and eviscerate the states' authority to regulate hundreds of state-chartered, nonbank financial services providers.

INTRODUCTION

This *amici curiae* brief will primarily address the second question presented in the petition: Do the OCC Regulations, by equating a state-chartered nonbank operating subsidiary with a national bank for purposes of federal preemption of state regulation, violate the Tenth Amendment to the United States Constitution?

The court of appeals held that the OCC Regulations preempted various provisions of Michigan law and did not violate the Tenth Amendment to the United States Constitution. *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005). As identified by the court below, the focus of Michigan's argument is 12 C.F.R. § 7.4006, the OCC's operating subsidiary rule.

Since their inception in the 1960's, operating subsidiaries of national banks have always been subject to regulation by the states. This case, like others around the country, has arisen from an unprecedented assertion of preemptive authority by the OCC, at the expense of state sovereignty and the well-being of the banking public, in an industry that this Court has recognized to be "of *profound local concern*," both "as a matter of history and as a matter of present commercial reality. . . ." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980) (emphasis added). The regulation in question, 12 C.F.R. § 7.4006, articulates a preemption rule for these state-chartered operating subsidiaries that is coextensive with regulations applicable to the parent national bank,[5]

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[5] 12 C.F.R. § 7.4006 provides: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that

including 12 C.F.R. §§ 7.4000 (visitorial powers), 7.4008 (non-real estate lending), 7.4009 (applicability of state law to national bank operations), and 34.4 (applicability of state law to real estate lending). This brief will refer to these regulations collectively as the "OCC Regulations."

Together, the OCC Regulations effectively give not merely national banks but also their operating subsidiaries *carte blanche* to ignore state laws they find inconvenient. If these regulations continue to be upheld, large banking organizations will be in a position to have their cake and eat it too, at the expense of the states and the consumers who are protected by state banking laws. Here, for example, Respondent Wachovia Bank wishes to (1) enjoy the insulation from liability for Respondent Wachovia Mortgage's acts or omissions that is provided by the doctrine of corporate separateness, and (2) simultaneously ignore that separate corporate existence and treat the subsidiary mortgage company as though it were a department of the bank itself for purposes of avoiding compliance with state law. This contradiction defies both logic and well over a century of settled law.

Yet the OCC has been remarkably successful with a national litigation strategy of appearing in the lower federal courts around the country, either as a party or as *amicus curiae*, and persuading them to accord undue deference in misplaced reliance upon this Court's decision in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and to disregard nearly 150 years of history in our dual banking system. That campaign has resulted in court rulings, including the one below, which subvert several cornerstone legal principles, most notably those of corporate separateness,[6] the

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those laws apply to the parent national bank."

[6] *See, e.g., Dole Food Corp. v. Patrickson*, 538 U.S. 468, 474 (2003); *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998).

primacy of state corporation law,[7] and the presumption against preemption.[8]

Operating subsidiaries were conceived as vehicles for separating particular business activities and their attendant risks from the business conducted by the parent bank. When the OCC originated the idea during the mid-1960's, the Federal Reserve objected on the grounds that no provision of the National Bank Act authorizes such subsidiaries, and, in the absence of such an independent authorization, 12 U.S.C. § 24 (Seventh) actually forbids a national bank from owning stock for its own account, a prohibition that manifestly eliminates the possibility of owning a subsidiary. Ultimately, the OCC reached agreement with the Federal Reserve, on the condition that these "op. subs" would be forbidden from engaging in any activity other than those that could be done by the bank and at only those locations where the bank could do them, thereby preventing evasion by the parent bank of state branching restrictions. The OCC stands this entire concept on its head by recharacterizing that same activities/same locations condition as establishing legal equivalence between the parent bank and its subsidiary, even though the latter does not (and cannot) have a national bank charter; is in fact chartered by an entirely different sovereign; and has no eligibility for membership in the Federal Reserve System, no legal authority to fund its activities by accepting deposits from the public, and no entitlement to

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[7] *See, e.g., CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 85-86 (1987); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977); *Cort v. Ash*, 422 U.S. 66, 84 (1975); *Oregon Ry. & Navigation Co. v. Oregonian Ry. Co.*, 130 U.S. 1, 20 (1889); *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 208 (1944).

[8] *See, e.g., Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 339 (2005); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

federal deposit insurance.

The arguments now embraced by the OCC depart dramatically from its own historic interpretation of the national banking laws. Not until 2001 did the OCC even claim to have exclusive preemptive authority over operating subsidiaries. 66 Fed. Reg. 34,784, 34,788 (2001). Only ten years earlier, the OCC had no qualms about abandoning the same activities/same locations characteristic that now forms the linchpin of its preemption position on operating subsidiaries. Emboldened by its victory in *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995), involving a national bank that had used an operating subsidiary to sell annuities, the OCC promulgated a revised operating subsidiary regulation, which contemplated authorizing such subsidiaries to engage in activities that were *not* permissible for the parent national bank. *See* Office of the Comptroller of the Currency, Rules, Policies, and Procedures for Corporate Activities, 61 Fed. Reg. 60,342 (Nov. 26, 1996). Thus, for purposes of determining whether and to what extent deference is owed to the administrative agency, the OCC's recent insistence that there is no legal distinction between national banks and their operating subsidiaries can scarcely be considered either longstanding or consistent. Furthermore, the OCC rescinded that 1996 regulation in 2000 after having been rebuked by Congress for allowing operating subsidiaries to conduct activities not authorized for their parent banks. 65 Fed. Reg. 12,905, 12,909 (2000).

Of fundamental importance to this case is the absence of any provision in the National Bank Act authorizing the OCC's encroachment into these traditional areas of state authority. Indeed, from the creation of the national banking system, the prevailing characteristic of our dual banking system has been concurrent federal and state regulation. Whereas the National Bank Act contains only one provision that expressly preempts state law, 12 U.S.C. § 85, several provisions of the Act require the OCC to defer to and abide by the policy choice

made by state law, *see, e.g.*, 12 U.S.C. §§ 36, 92a, 214c, while its overall structure and tone contemplate the coexistence of the laws of the state and federal sovereigns, as the OCC's own regulations have recognized. *See* 12 C.F.R. § 7.2000(b) (permitting national banks, where not inconsistent with federal banking laws and regulations, to choose corporate governance procedures from a menu of state corporate law options). Under this scheme, federally chartered banks have *always* been subject to various state laws. Over a century of consistent case law supports this view.[9] These tenets are fundamental to the notions of comity that underlie "Our Federalism." *Younger v. Harris*, 401 U.S. 37, 44 (1971). If these principles apply to national banks themselves, then *a fortiori* state laws must also apply to their state-chartered operating subsidiaries.

One of the most troubling aspects of this case is that the mischief wrought by the OCC's preemption campaign could extend beyond national banks and their operating subsidiaries. In 2005, the Financial Services Roundtable, a trade organization of leading banking and other financial services organizations, filed with the FDIC a petition seeking the exercise by that agency of preemptive authority so as to give state-chartered banks comparable immunity from state consumer protection laws to what their national bank brethren enjoy as a result of the OCC's Regulations. The FDIC held a public hearing on this proposal and thereafter issued for notice and comment a proposed rulemaking on the requested

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[9] *See, e.g., Atherton v. FDIC*, 519 U.S. 213, 222-23 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 244-54 (1944); *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 656 (1924); *McClellan v. Chipman*, 164 U.S. 347, 359 (1896); *National Bank v. Commonwealth of Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870).

preemptive action.[10] If the FDIC were to promulgate a valid preemptive rule, then state authority over banking, mortgage banking, and consumer protection would be further devitalized.

If federal banking regulators were allowed to continue down this path of increasingly sweeping preemption of state laws governing various state-chartered entities, very few nonbank and nonbank-affiliated lenders would remain subject to state law. Even those few might be able to evade state regulation by availing themselves of a practice known as "charter renting."[11] One federal court recently upheld such an arrangement under the very same rationale used by the court below. *See, e.g., SPGGC, LLC v. Ayotte*, ___ F. Supp.2d ___, 2006 WL 2165672 (D.N.H. Aug. 1, 2006) (National Bank Act

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[10] *See* Federal Deposit Insurance Corporation, Petition for Rulemaking to Preempt Certain State Laws: Notice of Public Hearing, 70 Fed. Reg. 13,413 (Mar. 21, 2005); *id.* at 13,417 (reproducing text of Mar. 4, 2005 Financial Services Roundtable petition); Federal Deposit Insurance Corporation, Interstate Banking; Federal Interest Rate Authority: Notice of Proposed Rulemaking, 70 Fed. Reg. 60,019 (Oct. 14, 2005).

[11] Charter renting is a contractual arrangement between a nonbank lender and a depository institution (often a national bank) located in a state with no usury limits for consumer loans. By "renting" out its charter to the nonbank lender, the national bank effectively exports unregulated interest rates from the state in which it is located to the borrower's home state, whose usury laws have been expressly preempted by *Congress* under 12 U.S.C. § 85, rather than by unilateral action of an administrative agency. *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003). The nonbank indemnifies the bank whose charter it is renting, and the bank underwrites the loans; the nonbank acts as loan originator and collection agent, and the two institutions share in the profits.

preempted limitations that New Hampshire Consumer Protection Act would have imposed on fee structure of stored value gift cards promoted and sold by bank's "agent").

Thus *amici*, like the Petitioner and other similarly situated state officials, face an unprecedented array of federal administrative incursions into traditional areas of state sovereignty protected by the Tenth Amendment. In a mere two sentences, however, the court below dismissively rejected the state's Tenth Amendment claim, without analysis. The court of appeals evidently viewed the Tenth Amendment as mere surplusage – as little more than a tautology -- rather than a constitutional provision that was hotly debated by the Federalists and the Anti-Federalists and then placed by them, with great deliberation, at the conclusion of the Bill of Rights. The court of appeals concluded -- somewhat facilely, as have several other courts -- that because banking is commerce, which falls within Congress' Article I powers, there is no Tenth Amendment interest of the states to protect. That conclusion encompasses two profound errors: (1) that there is no substantive content to the Tenth Amendment, and (2) that the preemption taking place here was an exercise by Congress of its commerce power, as opposed to an unauthorized arrogation of power by an administrative agency acting without the direction of Congress.

This case presents an opportunity for the Court to clarify the scope of the Tenth Amendment, particularly as applied to exercises of preemptive authority by federal administrative agencies, in order to accord state laws the full measure of protection guaranteed by the Constitution.

SUMMARY OF THE ARGUMENT

Adopted by the Framers as a bulwark against federal encroachment upon state sovereignty and individual rights, the Tenth Amendment requires that whatever governmental authority is neither delegated by the Constitution to the federal

government "nor prohibited by it to the States" must be "reserved to the States respectively, or to the People." In holding that the Tenth Amendment is not violated by regulations of the Comptroller of the Currency purporting to preempt state laws, as applied not only to national banks but to their state-chartered operating subsidiaries, the court of appeals erred for three reasons:

1. States' authority over corporations chartered under state corporation laws and states' regulation of foreign corporations doing business within their borders are fundamental aspects of state sovereignty. So too is the police power of the state exercised for the protection of its citizens against abusive mortgage lending and other predatory lending practices. The Tenth Amendment constitutes a bar against federal agency efforts to preempt these sovereign attributes where, as here, the administrative preemption is undertaken in the absence of "explicitly conferred" statutory authority, *Hopkins Fed. Sav. & Loan v. Cleary*, 296 U.S. 315, 336-37 (1935), or other clear manifestation of congressional intent to preempt. Here, far from acting pursuant to any such authority, the OCC preempted a broad array of state laws even in the face of longstanding and oft-repeated congressional support for state regulation of consumer protection and fair lending.

2. The presumption against preemption articulated by this Court in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), and its progeny admonishes courts against finding that historic state police powers have been superseded "unless that was the clear and manifest purpose of Congress." Under proper application of the Tenth Amendment, this presumption against preemption of state laws warrants heightened emphasis in cases of purported preemption by a federal agency. Absent clear congressional authorization, such administrative preemption takes place outside the political process safeguards of federalism, which this Court identified in *Garcia v. San Antonio*

Metropolitan Transit Authority, 469 U.S. 528 (1987), as the primary source of the states' Tenth Amendment protection. Fundamental to those political process safeguards is political accountability to the electorate, which is present when Congress and the President together enact laws but absent when federal agencies make law by rulemaking. Especially in light of this Court's insistence that Congress provide a "clear statement" to overcome the presumption against preemption, *Gregory v. Ashcroft*, 501 U.S. 452, 460-464 (1991), the political process safeguards that give meaning to the Tenth Amendment demand unmistakably clear evidence of congressional authorization before agency preemption can be upheld. No such evidence exists in the case of the OCC Regulations at issue here. Indeed, far from expressly or impliedly conferring preemptive authority upon the OCC, Congress has repeatedly indicated its desire that state regulation of mortgage lending and other areas continue undisturbed.

3. *Garcia's* political process safeguards inform the interpretation of the Supremacy Clause, U.S. CONST. art. VI, cl. 2, pursuant to which only three categories of federal law constitute the "Supreme Law of the Land." Agency rulemaking is not among them. Not designed to represent the interests of the states *qua* states, and unfettered by the requirements of bicameralism and presentment that this Court has insisted be observed for statutes to qualify as "Laws of the United States" within the meaning of the Supremacy Clause, federal agencies may not enjoy preemptive authority for their regulations except in two circumstances: (i) Congress, in compliance with the requirements of Article I, Section 7, has expressly delegated preemptive authority to the agency, or (ii) in compliance with those same requirements, Congress has enacted an expressly or impliedly preemptive statute that the agency is merely interpreting. The OCC Regulations at issue here do not meet either of those requirements. Hence, they do not preempt state law.

ARGUMENT

I. THE TENTH AMENDMENT BARS ADMINISTRATIVE PREEMPTION WHERE A FEDERAL AGENCY ACTS WITHOUT EXPRESS STATUTORY AUTHORITY OR OTHER CLEAR MANIFESTATION OF CONGRESSIONAL INTENT TO PREEMPT.

The court of appeals erred in holding that the Tenth Amendment does not bar the OCC Regulations from preempting Michigan's laws governing mortgage lending subsidiaries of national banks. The entirety of the Sixth Circuit's reasoning reads as follows: "We agree with the district court that *Congress assumed the authority to regulate national banks* under the Commerce Clause. The Tenth Amendment, reserving to the states those rights and powers not enumerated, is therefore not implicated by the National Bank Act or lawfully promulgated regulations thereunder." *Watters*, 431 F.3d at 563 (emphasis supplied).

Yet even that curt conclusion is enough to reveal the Sixth Circuit's fundamental error. Unlike preemption by *Congress*, the preemption here was done by an agency's naked assertion of authority in the absence of any express statutory authority or other clear manifestation of congressional intent. On the contrary, the OCC acted in the face of well-known congressional opposition to expanding the agency's authority at the expense of state banking regulation. *See, e.g.*, H.R. REP. NO. 103-651, at 53 (Conf. Rep.) (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074 (noting states' "legitimate interest in protecting the rights of their consumers, businesses, and communities" and disclaiming any congressional intent "to alter this balance and thereby weaken States' authority").

The durability of our constitutional system owes much to the ingenious and innovative federalism of the Framers'

constitutional design, which has been called "the unique contribution of the Framers to political science and political theory." *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) (citing Henry J. Friendly, *Federalism: A Forward*, 86 YALE L.J. 1019 (1977)). By insisting upon the creation and maintenance of multiple centers of concurrent power as an indispensable constitutional object, their design guarantees citizens "two political capacities, one state and one federal, each protected from incursion by the other." *Printz v. United States*, 521 U.S. 898, 920 (1997) (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). This legal system is "unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Id.* Thus, our federalism ensures distribution of empowerment through a system that contemplates and invigorates alternative governmental actors that can, on behalf of the people, solve important social problems.

Federal intervention into the domain of commercial activities traditionally regulated by the states calls into question one of the "oldest questions of Constitutional law," *New York v. United States*, 505 U.S. 144, 149 (1992) -- namely, the appropriate spheres of sovereign authority of the federal and state governments and the proper relationship between them in our constitutional scheme. The Tenth Amendment is a key element in that design.

Placed by the Framers at the end of the Bill of Rights, the Tenth Amendment serves a very lawyerly drafting function: It negates any *expressio unius est exclusio alterius* construction by making the list of proscriptions in the Bill of Rights exemplary rather than inclusive, and vouchsafes to the States and to the people all powers that have neither been explicitly

conferred upon Congress nor proscribed to the States.[12] Thus, rather than being a grant of individual rights and liberties by positive law, the Bill of Rights establishes a structure whereby federal abridgment of those rights and liberties is interdicted, thereby giving to the States the *primary*, though not necessarily exclusive, role in protection and vindication of those rights.

The tautological approach of the Sixth Circuit and other courts simply avoids the difficult task of identifying and balancing the interests of the federal and state sovereigns. This Court should redress the necessary constitutional balance by identifying some of the substantive content of the sphere of state sovereignty protected by the Tenth Amendment and clarifying the proper role of federal administrative agencies in making preemption determinations that directly affect that sphere.

At the heart of this case are national bank operating subsidiaries, which are not federal instrumentalities but state-chartered nonbank corporations. The primary regulator of any corporate entity is its chartering authority. For federally chartered depository institutions, such as national banks, that

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[12] None of the first ten amendments positively confers individual rights and liberties upon the people. Rather, they assert prohibitions against federal trammeling of those rights and liberties and provide some specificity as to what those limitations on the federal legislative power are, beyond the prohibitions articulated in the body of the Constitution, *e.g.*, against bills of attainder, ex post facto laws, conferring title of nobility, suspending the writ of habeas corpus, and disproportionate taxation. U.S. CONST. art. I, § 9. The other side of the coin consists of those provisions protecting the preserve of the national government by prescribing limitations on the powers of the States, *e.g.*, proscriptions against States entering into treaties, alliances, or confederations, coining money, granting letters of marque, and passing their own bills of attainder or ex post facto laws. U.S. CONST. art. I, § 10.

entity is the United States, but that is not the case for all of the nonbank affiliates of those institutions, including their parent holding companies, their sister holding company subsidiaries, and their own operating subsidiaries. For them, the chartering authority is a sovereign state, just as it is for state-chartered banks. That state, which brings such institutions into existence, has a legitimate and compelling interest in preserving that existence in the current competitive realities of the financial services industry and in ensuring that those institutions serve the purposes for which they have been created. Other states in which they do business as foreign corporations have an equally compelling interest in regulating the commercial activities of those entities.

For approximately seventy years, it has been recognized that undue federal interference with this principle of comity is a violation of the Tenth Amendment. *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120 (1937); *Hopkins Federal Savings & Loan Ass'n v. Cleary*, 296 U.S. 315 (1935). As Justice Cardozo observed in his opinion for the *Hopkins Federal* Court:

> A corporation is a juristic person organized by government to accomplish certain ends, which may be public or quasi-public, though for other purposes of classification the corporation is described as private. . . . This is true of building and loan associations in Wisconsin and in other states. They have been given corporate capacity in the belief that their creation will advance the common weal. The state, which brings them into being, has an interest in preserving their existence, for only thus can they attain the ends of their creation. They are more than business corporations. They have been organized and nurtured as quasi public instruments. . . . How they shall be formed, how maintained and supervised, and how and when dissolved, are

> matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power *explicitly conferred.*

Id. at 336-37 (citations omitted) (emphasis added). *Hopkins Federal* invalidated an *act of Congress* as just such an unconstitutional infringement of state sovereignty. This case involves comparable action by the OCC, but without any legitimating buttress of congressional support, much less an "explicitly conferred" statutory authority.

Thus, in the case of the OCC Regulations at issue, where federal intrusion into the domain of state regulation is undertaken by an agency not only in the absence of authority "explicitly conferred" by Congress, *Id.* at 337, but even in the face of clear congressional intent that such authority *not* be conferred, then both state sovereignty and Tenth Amendment principles are violated and the agency's assertion of preemption must be deemed invalid.

Furthermore, the significance of the dual system of regulation in the evolution of the financial services industry in the United States can scarcely be overstated. It epitomizes a system in which the empowerment of multiple governmental actors has occasioned significant societal benefits by promoting competition among various sectors of the financial services industries, facilitating diversification by banking organizations, and protecting the public against unscrupulous lending practices. As found by a White House task group, "state participation in the chartering and regulation of financial institutions can genuinely be regarded as one of the finest examples of cooperative federalism in the nation's history. Because the balance of state and federal regulatory participation helps promote the public interest in a safe and competitive financial system, the dual system of chartering financial institutions should be maintained and strengthened wherever

possible." *Bush Task Group Report on Regulation of Financial Services: Blueprint for Reform (Part 1): Hearings Before a Subcomm. of the House Com. on Gov't Operations*, 99th Cong., 43-44, 46 (1984), *reprinted in* Fed. Banking L. Rep. (CCH) No. 150, Part II (Nov. 16, 1984). In that regard, the states have historically been responsible for a variety of innovations which are now commonplace, such as branch banking, real estate lending, trust department operations, and checking and other transaction accounts. Even interstate banking, which has been indispensable to the growth of megabanks such as Respondent Wachovia, was a state innovation.[13] Thus, as in Justice Brandeis's oft-quoted dictum, the states truly have served as laboratories for trying "novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

These important interests reside at the core of what the Tenth Amendment protects.[14] Proper respect for Tenth Amendment principles would allow the State of Michigan to regulate state-chartered mortgage companies, such as Respondent Wachovia Mortgage; it would also allow the State of Maryland to restrict excessive prepayment fees on adjustable rate mortgages through the statutes enjoined in *National City Bank v. Turnbaugh*.

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[13] *See Northeast Bancorp v. Board of Governors*, 472 U.S. 159 (1985) (upholding regional interstate compact allowing reciprocal interstate banking against commerce clause, compact clause, and equal protection challenges).

[14] *Cf. EEOC v. Wyoming*, 460 U.S. 226, 264 (1983) (Burger, C.J., with Powell, Rehnquist, and O'Connor, JJ., dissenting) (expressly linking Tenth Amendment values with Justice Brandeis's "states as laboratories" concept); *FERC v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., with Burger, C.J. and Rehnquist, J., dissenting) (linking discussion of Tenth Amendment federalism values to state laboratory function).

For its part, Congress is well aware that the dual banking system serves as an important source of innovation and progress. Congress has consistently sought to preserve it, as is clear from Section 7 of the Bank Holding Company Act[15] and from the revolutionary interstate banking legislation of the 1990's, the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (1994) (hereinafter "IBBEA"). Indeed, it is particularly anomalous for Respondents and the OCC to argue, as they have below and in several other courts, that preemption is either necessary or appropriate, given Congress' longstanding and oft-repeated expressions of support for the continued vitality of state banking regulation. In the IBBEA, for example, Congress adhered to its unwavering policy of maintaining the balance of federal and state law under the dual banking system by ensuring that the application of state laws to national banks in the ordinary course of business is an essential element of that policy. It was effectuated by subjecting interstate branches of large, multi-state national banks, such as Respondent Wachovia Bank, to the laws of their host states in four comprehensive categories: community reinvestment, consumer protection, fair lending, and intrastate branching. 12 U.S.C. § 36(f).[16] Since

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15 "The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." 12 U.S.C. § 1846. A comment in the Senate Report underscores the point: "It is always of uppermost importance in legislation of this nature to preserve the dual system of National and State banks . . . ." S. REP. NO. 1095, 84th Cong. 2d Sess., pt. 2, at 5 (1956).

16 The Conference Report expressly noted the States' "legitimate interest in protecting the rights of their consumers, businesses, and communities," and insisted that "Congress does not intend that the [IBBEA] alter this balance and thereby

that is the law for national banks themselves, it is difficult to see how OCC and Respondents can justify more favorable treatment for operating subsidiaries, even under their own approach of cloaking the state-chartered subsidiaries in the garb of national banks.

The OCC's Regulations stand athwart this longstanding congressional policy of preserving the dual banking system. Attempting to "federalize" what state-chartered operating subsidiaries can lawfully do is just the sort of unconstitutional infringement of state sovereignty that this Court invalidated in *Hopkins Federal*. Without any legitimating manifestation of congressional support, much less an "explicitly conferred" statutory authority, the OCC's assertion of preemption violates the Tenth Amendment.

II. IN CASES INVOLVING AGENCY PREEMPTION, THE TENTH AMENDMENT ELEVATES THE PRESUMPTION AGAINST PREEMPTION TO REQUIRE UNMISTAKABLY CLEAR EVIDENCE THAT CONGRESS HAS GIVEN THE AGENCY POWER TO PREEMPT.

The court below avoided the task of identifying and balancing the respective interests of federal and state sovereigns as they relate to regulation of one of the most common, basic, and necessarily *local* commercial transactions: obtaining a mortgage for one's home. Instead, the court of appeals, like the OCC, cut a broad swath through traditional areas of state sovereignty by ruling out concurrent state regulation. Such encroachment on state autonomy and self-governance directly

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weaken States' authority . . . ." H.R. REP. NO. 103-651, at 53 (Conf. Rep.) (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

implicates the core concerns of the Tenth Amendment. Those concerns are heightened where, as here, the political safeguards of federalism identified as essential by this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1987), have been circumvented because preemption has been effected without congressional authorization.

The premise of *Garcia* and its vision of the Tenth Amendment relies upon the implicit protection of state interests via their political representation in Congress. *Id.* at 551-52. However, unlike Congress, federal agencies do not in any sense represent the states. Agency heads, such as the Comptroller of the Currency, are selected by the President, and agency staff are, by design, supposed to be disconnected from the political arena and serve as sources of technical expertise. *See generally* LOUIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE (1981). As a federal administrative agency, the OCC is not accountable to the electorate; moreover, it is subject to institutional pressures that tend to make it more likely that state interests will be overlooked or undervalued. For example, the OCC largely subsists on fees paid by the institutions it regulates. The ability to generate agency revenues by collecting these fees creates incentives for the OCC to encourage more and more banking organizations to opt for the national charter. Those financial incentives make the agency's decision-making process susceptible to error and resistant to correction in ways that are not implicated when the decision-maker is an elected, representative body.

Precisely in order to prevent such results, this Court has long recognized a presumption against preemption in traditional areas of State regulation. "[W]e start with the assumption that the historic police powers of the states were not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230. *See also Dow Agrosciences*, 544 U.S. at 449; *Medtronic*, 518 U.S. at 485 (1996); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995);

CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 668 (1993). Among the presumption's antecedents is the venerable rule that "a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 623 (1898). *See Sinnot v. Davenport*, 63 U.S. (22 How.) 227, 243 (1859).

The concerns animating and supporting the presumption against preemption are elevated by the Tenth Amendment when the preemption is effected not by Congress but by an administrative agency acting without congressional authorization. In such situations, the federal agency operates without the political accountability that is vital to this Court's application of the Tenth Amendment. For example, the Court has held that Congress cannot "commandeer the legislative processes of the States by compelling them to enact and enforce a regulatory program." *New York v. United States*, 505 U.S. at 161 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). If Congress were permitted to commandeer sovereign state resources to accomplish federal goals, "the accountability of both state and federal officials [would be] diminished." *New York*, 505 U.S. at 168. *See also Printz*, 521 U.S. at 920 ("The Constitution contemplates that a State's Government will represent and remain accountable to its own citizens.") (citing *New York*, 505 U.S. at 168-169; *Lopez*, 514 U.S. at 576 -577 (Kennedy, J., concurring)).[17]

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[17] Preemption, by ordering state legislatures *not* to regulate in an area clearly of interest to them, can be viewed as a form of "negative commandeering." *See* Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11, 27-28 (2000). If affirmative commandeering is unconstitutional, negative commandeering must be regarded as

The absence of the political accountability component demanded by the Tenth Amendment raises the bar considerably in agency preemption cases. Such administrative intrusions on traditional state authority will be given effect only when a statute's language makes the Court "absolutely certain that Congress intended" such a result. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

Thus, in order to enhance the safeguards of federalism, this Court has recognized, as a gloss on the presumption against preemption, an additional canon of interpretation requiring a *clear statement* from Congress. *Id.* at 460-461. Such a statement would constitute "unmistakably clear" evidence indispensable to ensuring that courts do not displace state law in the name of a command Congress did not actually enact into law. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (When "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."). *Accord, Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 541 (2002); *Gregory*, 501 U.S. at 460; *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). The court below simply disregarded the clear statement requirement. Instead, the Sixth Circuit announced that the presumption against preemption "disappears . . . in fields of regulation that have been

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at least problematic. Indeed, as Professor Tushnet explains, it may be worse: "Affirmative commandeering puts a new and undesired element on the legislative and executive agenda. Everything below it on the legislature's priority list shifts down a bit and, given limited time and political resources, some things drop off the list entirely. Notice, though, that the things that drop off the list are, necessarily, low-priority ones anyway. In contrast, negative commandeering can remove from the legislative and executive agenda the policy that constituents want more than anything else." *Id.* at 30.

substantially occupied by federal authority for an extended period of time. Regulation of federally chartered banks is one such area." *Watters*, 431 F.3d at 560 n.3 (quoting *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005)). Actual history, however, directly contradicts the court of appeals' conclusion. Regulation of banking in this country was exclusively the domain of the states until creation of the national banking system during the Civil War. Since then, there has been both implicit and explicit congressional recognition and endorsement of the dual system of federally chartered and state-chartered banks coexisting in a competitive regulatory framework. Moreover, for the 35 years from 1966, when the OCC first officially introduced operating subsidiaries, until 2001, when it abruptly claimed exclusive preemptive authority over them, the states, and not the OCC, have consistently and efficaciously regulated these state-chartered nonbank entities.

The "clear statement" rule, so conspicuously absent from the decision below, necessitates the rejection of preemption here. In cases of agency preemption, the Tenth Amendment, in tandem with the presumption against preemption, must require unquestionable legislative clarity in order to ensure that Congress and the President, rather than politically unaccountable federal agencies, make the crucial decision to preempt state law. Agencies cannot simply stand in Congress' stead when questions of federalism are at stake. They are not designed to represent the interests of the states, and typically state interests are not part of the federal administrative calculus.

In this case, the OCC's assertion of preemption cannot be valid, because there is no clear expression of a congressional intent to preempt state banking laws. On the contrary, far from expressly conferring preemptive authority on the OCC, Congress has repeatedly indicated its desire that the states continue to regulate in areas such as consumer protection, fair lending, and banking in general.

The court below, and the other courts that have addressed OCC preemption, have muddied these waters by applying *Chevron* deference to the OCC's preemption assertion where no such deference was due. Rather than requiring a clear statement of intent to confer preemptive power upon the OCC, the Sixth Circuit was satisfied that, in its unduly limited view of banking law and history, nothing in the National Bank Act indicates that Congress expressly *disapproved* of the agency's preemption decision. That reasoning stands the presumption against preemption on its head. The court below inferred approval of preemption from congressional silence instead of insisting on a clear congressional indication of its intent to alter the federal-state balance, either by itself exercising the power to preempt, or by delegating the potential exercise of that power to the OCC. Such an inverted presumption obliterates the necessary political accountability and vitiates the states' ability to seek protection against encroachment on their authority through *Garcia*'s political process safeguards. The decision below is thus incompatible with the Tenth Amendment and can be reversed on this ground alone.

III. UNDER *GARCIA'S* POLITICAL PROCESS SAFEGUARDS APPROACH TO THE TENTH AMENDMENT, THE OCC REGULATIONS CANNOT QUALIFY AS THE SUPREME LAW OF THE LAND.

Preemption through agency regulations undermines the political process safeguards of federalism in another important way. The Framers, through the Supremacy Clause, authorized state law to be displaced solely by three specific types of federal law: the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States." U.S. CONST. art. VI, cl. 2. Although there are many instances in which an agency's regulations can be

given preemptive effect, in such cases either the agency is simply interpreting a statute in which Congress itself has exercised preemptive power, *see, e.g., Smiley v. Citibank*, 517 U.S. 335 (1996), or else Congress is found to have expressly or impliedly delegated preemptive authority to the agency, *e.g., New York v. FCC*, 486 U.S. 57 (1988). "[A]n agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Nor is the comprehensive nature of mere regulations adequate to confer preemptive effect. "To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717 (1985).

Thus, this Court's interpretation of the Supremacy Clause takes into account the same political process safeguards *Garcia* relied upon as the essence of what the Tenth Amendment protects. As noted above, that clause recognizes three categories of law as "the Supreme Law of the Land." Elsewhere in the Constitution, the Framers prescribed in detail procedures that were "finely wrought and exhaustively considered," *INS v. Chadha*, 462 U.S. 919, 951 (1983), to govern the adoption of each type of law recognized in the Supremacy Clause. Article V and Article VII establish precise procedures for adopting and amending the Constitution; Article II, Section 2 prescribes the procedures for making Treaties; and Article I, Section 7 sets forth the detailed procedures for adopting "Laws." The Framers deliberately made the adoption of each category difficult by requiring the assent of multiple participants, all of whom are subject to the political safeguards

of federalism.[18] By making federal law more difficult to adopt, and by giving to those federal institutions designed to serve state interests, such as the Senate, effective veto power over all three forms of potential "Law of the Land," these procedures protect the residual authority of the states and constitute the core of *Garcia's* political process safeguards.

While the Supremacy Clause's most commonly understood function is to declare the preeminence of the enumerated sources of federal law over any state law "to the Contrary," it carries with it a negative corollary as well: State law remains unaffected in the absence of something qualifying as the Supreme Law of the Land. As the OCC's Regulations do not so qualify, they cannot result in preemption. The political process protections of the Tenth Amendment demand nothing less.

Though it may seem an unlikely ally for those opposing preemption, the Supremacy Clause contains very specific and illuminating language about what the Framers intended. When it comes to "Laws of the United States which shall be made in Pursuance" of the Constitution, the only way these can be created is by strict compliance with the bicameralism and presentment requirements of Article I, Section 7. To remove ambiguity, and to prevent Congress from designating a potential "Law" as something other than a "Bill," the Framers

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[18] This was particularly true of the Senate, which is the common denominator for all three categories recognized by the Supremacy Clause and which, at the time the Constitution was ratified, was composed of individuals with especially strong ties to the states, given that Senators were directly appointed by the state legislatures. Adoption of the Seventeenth Amendment may have attenuated those ties by providing for election of Senators by popular vote, but it has not otherwise diminished the difficulties inherent in making or amending what the Supremacy Clause recognizes as the "Supreme Law of the Land."

included an additional clause which provides:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and the House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, *according to the Rules and Limitations prescribed in the Case of a Bill.*

U.S. CONST. art. I, § 7, cl. 3 (emphasis added). The specificity and comprehensiveness of the procedures contemplated by this clause would lose much of their meaning if "Laws" capable of preempting state law could be made by other means or by other actors. Clause 3 therefore requires that Article I, Section 7 be regarded as prescribing the exclusive methodology for adopting "Laws of the United States."

This understanding of what is meant by the phrase "Laws of the United States" is confirmed by consistent usage of the operative word, "Laws," throughout the text of the Constitution:[19]

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[19] The historical evidence is also consistent with this understanding. Three mechanisms for resolving conflicts between federal and state law were introduced at the Constitutional Convention of 1787: (1) giving Congress power "to negative all Laws which they shd. Judge to be improper," James Madison, *Notes on the Constitutional Convention* (June 6, 1787) (quoting Charles Pinckney), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 164 (Max Farrand ed., 1911); (2) giving the Executive branch authority "to call forth the force of the Union [*i.e.*, use military force] agst. any member of the Union failing to fulfill its duty [to comply with federal law]," *id.* at 21 (Madison's notes of May 29, 1787); and (3) giving the judiciary power to treat acts of Congress as "the

- Art. I, § 4, cl. 1;
- Art. I, § 4, cl. 2;
- Art. I, § 6, cl. 1;
- Art. I, § 9, cl. 7;
- Art. II, § 2, cl. 2;
- Art. II, § 3;
- Art. III, § 2, cl. 1;
- Art. III, § 2, cl. 3; and
- Art. IV, § 1.

Each of these instances of the term "Law" (or its plural) manifestly refers to legislative action taken in accordance with the procedures mandated by Article I, Section 7.[20]

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supreme law of the respective States," *id.* at 245 (Madison's notes of June 15, 1787). The latter became our Supremacy Clause. The decision to designate therein only the "Constitution, . . . Laws . . . made in Pursuance thereof, and . . . Treaties" as "the Supreme Law of the Land" rendered them the exclusive methods capable of trumping state law, thereby eliminating the manifest dangers that would result from allowing federal agency officials to make random judgments about the propriety of state law.

[20] While the Constitution does also use the term occasionally to refer to common law (*e.g.*, "at Law or Equity" in Art. III, § 2, cl. 1) or to state law (*e.g.*, art. I, § 10, cl.1 prohibiting states from passing any "ex post facto Law, or Law impairing the Obligation of Contract"), taken in context these references do not call into question what is meant by usage of the term in connection with Laws to be passed by Congress and presented to the President. Obviously, the common law is not made "in Pursuance of" the Constitution, and to suggest that state Laws are treated by the Supremacy Clause as "the Supreme Law of the Land," would ignore the language of that Clause, which contrasts "Laws of any State" with "Laws of the United States . . . made in Pursuance [of the Constitution]."

Indeed, decisions of this Court have insisted that Congress must comply fully with the procedures prescribed in Article I, Section 7. For example, failure to adhere to those procedures has prompted this Court to strike down congressional efforts to permit legislative branch agents to exercise the legislative power without regard to bicameralism and presentment, and legislation giving the President power to cancel portions of a statute post-enactment. *See INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991); *Clinton v. City of New York*, 524 U.S. 417 (1998).

The administrative lawmaking process is ill-suited to protecting the concerns of the Tenth Amendment and its procedural process safeguards. Unrestrained by the requirements of bicameralism and presentment, federal agencies can promulgate new provisions much more easily than Congress can enact statutes. Unlike Congress, agencies are not designed to and, in fact, do not represent the interests of the states *qua* states. The Framers' "finely wrought and exhaustively considered" lawmaking process, *Chadha*, 462 U.S. at 961, was designed, *inter alia*, to interpose a considerable impediment to federal encroachment on state prerogatives. If agency lawmaking by regulation could displace state law without express congressional authorization, a preemptive rule that could not command a legislative majority could nonetheless become federal law. Worse still, even if an overwhelming majority of both houses of Congress believed that such an agency preemptive rule would unduly trammel state authority, the onus would then be on *Congress* to overcome those same structural impediments in order to overrule the agency legislatively.

With regard, then, to agency preemption, the political process safeguards of the Tenth Amendment demand strict compliance with the language of the Supremacy Clause before agency regulations may be given preemptive effect. In turn, the

net effect of the language of the Supremacy Clause, read in context with the language and structure of the Constitution as a whole, is that no agency regulations can ever be "the Supreme Law of the Land" with preemptive effect *unless* Congress, in compliance with the requirements of Article I, Section 7, has expressly or impliedly delegated preemptive authority to the agency or has enacted an expressly preemptive statute that the agency is interpreting. Since the OCC Regulations before the Court do not meet those requirements, under the Tenth Amendment they cannot preempt state mortgage lending laws.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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